DOCUMENT RESUME

ED 239 351 EA 016 308

AUTHOR Jones, Thomas H.
TITLE Private Schools and National Policy: A Comparative Study of Australia and the United States.
PUB DATE 83
NOTE 179p.; Paper presented at the Annual Meeting of the American Educational Research Association (Montreal, Quebec, Canada, April 11-15, 1983). Portions of appendix may reproduce poorly due to broken or small print.
PUB TYPE Reports - Research/Technical (143) -- Viewpoints (120)

EDRS PRICE MF01/PC08 Plus Postage.
DESCRIPTORS Catholic Schools; Comparative Education; *Educational Policy; Elementary Secondary Education; *Federal Aid; Federal Regulation; *Financial Support; Foreign Countries; *Government School Relationship; Parochial Schools; Politics of Education; Private Education; *Private School Aid; Religious Education; School Choice; School Demography; School Support; Social Distribution; State Church Separation
IDENTIFIERS *Australia

ABSTRACT

Pursuant to the emerging political issue of government financial support for private schools in the United States, a study was made of the Australian system of educational finance, which includes substantial government aid to nongovernment schools. Following a historical analysis and typology of government educational policy in both countries, a composite profile of Australian policymakers' attitudes toward their federal government's school aid policies was derived from formal interviews with 10 Australian officials at levels ranging from school principal to minister of education, representing the three major school sectors--"government" schools, Catholic systemic, and independent nonsystemic schools. The 22 interview questions covered such issues as differences between governement and nongovernment schools, government influence on operations, curriculum issues, achievement levels, fees, racial/ethnic demographics, political affiliations, and religious/secular issues. Contrary to expectations, a high degree of consensus was revealed among these educational leaders' opinions, despite their diverse affiliations. A summary of their views is provided, followed by the implications of the study for educational policy in America. If the federal government begins to aid private schools, the results will be (1) incentives for closer cooperation between public and private sectors; (2) greater parental satisfaction; and (3) a boom in religious education; but also (4) an increase in social segregation, as upper income groups are siphoned off from the public school system. (TE)

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PRIVATE SCHOOLS AND NATIONAL POLICY:

A COMPARATIVE STUDY Of AUSTRALIA AND THE UNITED STATES

Assoc. Prof. Thomas H. Jones,
Centre for Administrative Studies,
Faculty of Education,
University of New England,
Armidale, N.S.W.

AERA
1983

EA 015 305

ACKNOWLEDGEMENTS

It is impossible to mention all those people who assisted this study in some form or other. In the United States, the Connecticut Research Foundation provided most of the essential funding. Bruce Stave of the Connecticut History Department read the proposal sympathetically and offered suggestions to improve the methodology. Frank Stone and John Brubacher played similar roles from their perspectives as educationists.

In Australia Ross Thomas put up with my budget complaints and marshalled resources to fill in the gap. Various members of the Centre for Administrative Studies were helpful in so many ways that it is difficult to single out one or two. Alby Jones was not only an interviewee but a very helpful adviser as well. I don't know how many times I said over the telephone, "Alby Jones suggested I talk to you." It worked in each case to open doors that I know would otherwise have been closed. Ross Harrold's school finance knowledge and extensive personal library saved me many hours. Bill Simpkins was willing to discuss my political typology at almost any hour of the day or night.

Outside the Centre, Peter Hobson and Kelvin Grose brought me (somewhat) up to speed on religion and education: an absolutely essential subject for anyone tackling the private school aid question. Ron Brown, Ray Maddocks and Tom Moore in Melbourne had insights on government schools which were not to be found in mere books. I approached Canberra rather late in the study. But Peter Tannock and his staff at the Schools Commission came through with the statistical detail I was seeking. Ray Costello saved me from more mistakes than I care to admit, but for those that remain I have only myself to blame.

In Australian parlance, "Guys, you're all beaut."

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CHAPTER I

Overview and Research Design

Although the United States and Australia are similar in many ways, their patterns of financing elementary and secondary education are quite different. Virtually all Australian primary and secondary schools are funded from State and Federal sources. Publicly administered "government" schools receive nearly one hundred percent funding from tax revenues. Privately administered, "non-government" schools receive less than one hundred percent of their income from taxation. But the amounts that non-government schools receive are still substantial. In the United States, on the other hand, privately administered schools receive virtually no government funds. And this difference provided an impetus for the present study.

The public finance of non-government schools has been a matter of particular concern in both countries. In the United States interest has, perforce, been largely conjectural. Milton Friedman has argued that society does have an interest in an educated populace and hence should finance schooling for all. But school administration, within broad limits, is not a matter for public concern. He would have nations abandon publicly administered schools entirely and replace them with various privately administered schools financed through vouchers. The feeling is that such schools would be more responsive to the infinite variety of individual preferences, thereby improving efficiency through the maximisation of consumer satisfaction.[1] Christopher Jencks has argued along somewhat the same lines, except that in order to safeguard the interests of poor people, he would strictly constrain the variety of

financing schemes that privately administered schools could adopt.[2] Plans recently proposed by John Coons hold a middle ground. He would retain the present publicly administered system of schools, but make private schools eligible for government funding as well.[3] And the Coons proposal for the United States closely resembles the present Australian scheme.

While the United States has planned and theorised, Australia has actually implemented schemes of government aid to non-government schools. The Commonwealth, that is, the Federal Government of Australia, has been giving substantial amounts of aid for more than a quarter century, and State Governments have followed suit, although with much smaller aggregate amounts. Table 1.1 summarises the major Australian legislation at the Federal level, with the 1973 legislation being by far the most important.

At the outset of this study, the religious and ethnic similarities of the two countries, their shared English language and cultural traditions created, in the mind of this writer at least, something vaguely like the conditions of a natural experiment. What happens when two countries, alike in other respects, adopt quite different school finance policies?

Research Procedures

Armed with these thoughts but few concrete facts on data the writer set out to design an empirical investigation. There were constraints. The writer, a Professor of Education Administration at the University of Connecticut in the United States, would be in Australia for only five months. He had never been in Australia before and had little prior knowledge of the country, beyond that described above. The university where the writer would be based, New England, was located in Armidale, New South Wales, far from any major population centres. The study would have to be fitted in amidst teaching and other duties. And research funds necessarily would be quite limited.

TABLE 1.1

Commonwealth Aid Applying Wholly or Partly to Non-Government Schools.

A Legislative Summary

Year	Legislation
1939	Conditional matching grants for technical schools
1952	School fees up to £50 deductible from income tax
1954	Private gifts for non-government school buildings are tax deductible
1956	Interest on loans for school buildings in the A.C.T. are paid by the government
1964	Assistance for building science laboratories
1968	Assistance for building school libraries
1969	Per pupil grants directly to schools Aboriginal scholarships and child migrant education programs
1972	Direct aid for all school buildings
1973	Aid to schools and school systems on a relative needs basis
1974	Teacher Inservice Disadvantaged Schools Special Education

Source: Don Smart, Federal Aid to Australian Schools, St Lucia: University of Queensland Press, 1978, passim

Beginning in the United States

For reasons mentioned above the present study had to be designed in the United States where little recent literature on Australian school finance was available. Among the most helpful documents were those of the U.S.-Australia Education Policy Project with its (U.S.) headquarters at the School of Education, Stanford University,[4] the writings of Donald Erickson and his colleagues on government aid to private schools in the

Canadian province of British Columbia,[5] and the reports of Joel Sherman and Harold Noah.[6] The works of Greeley and Rossi[7] and Greeley, McCready and McCourt[8] discuss the particular dynamics operating in American Catholic schools, and some Australian literature was sent to America through the good offices of the University of New England.[9] But these investigations - helpful as they were - dealt with specific aspects of the aid question, for example legal issues or religious education. There was no literature which provided a broad overview.

Accordingly, the writer set out to produce a broad overview of the type his literature search had failed to uncover. Since the debate in the United States is still being conducted at the public policy level rather than the planning or implementation level, policy making would be the focus of the present investigation. It seemed sensible to begin at the beginning: that is, to ask policy makers what they were doing and how it was working out. Accordingly the broad research question for study was formulated as follows:

> How do Australian educational and political leaders view their Federal Government's school aid policies?

The task was to develop a series of specific questions based on this general question. The list of specific questions would have to be drawn up so that they were helpful to the policy debate in the United States.

In 1978 the United States Senate's Committee on Finance conducted hearings on the question of income tax credits for private schools. Persons from more than one hundred United States organisations, representing a wide variety of political and religious persuasions, made prepared statements and took part in related discussion. All this information plus senators' questions and discussions were transcribed for the official record. The testiminy covered every conceivable aspect of the private school aid issue from taxes, to school curriculum, to school sport,

to morals and religion.

The 1978 Hearings proved to be crucial to the design of this study. They were sufficiently comprehensive to provide the desired breadth of subject matter. Yet the testimony was specific enough to facilitate construction of a semi-structured interview questionnaire for use with Australian policy makers. Once the questionnaire was drawn up, university colleagues of the researcher examined the questions for salience and clarity. Modifications of the original questionnaire were made. Colleagues at both the Universities of Connecticut and New England helped in this process.

Continuing in Australia

After final modifications of the interview schedule the next task was to select interviewees. In this connection the researcher was particularly fortunate to be located at the Centre for Administrative Studies, Faculty of Education, University of New England. The oldest and largest centre of its kind in Australia, the Centre for Administrative Studies attracts staff and students from all Australian states. Centre members acted as personal resources for this study. But in addition they provided specific suggestion as to who, outside the university, might be contacted for advice regarding whom to interview.

The procedure for selecting interviewees can be summarised briefly. First there were positional criteria. The composite list of interviewees had to represent different levels of policy making from School Principal to Minister of Education. All interviewees had to be either position incumbents or very recent retirees. And they had to have a primary association with each of the three major school sectors - eg. Government, Catholic systemic and independent non-systemic.

Equally important were the personal characteristics of the interviewees. A two stage selection process was used using a reputational

approach. In the first stage, knowledgeable persons were contacted for advice regarding whom to interview. These persons were told the general purposes and methods for the study. Then they were asked to supply names of individuals who, in their opinion, were particularly articulate and effective spokesmen for their point of view. If two persons, in independent conversations, nominated the same third person, that third person was asked for interview.

Each of the interviewees was then telephoned and asked if he or she would be willing to participate. The general nature of the topic was discussed with the interviewee at this stage, but not the specific questions to be asked. (Spontaneous responses were considered preferable to prepared, "party line" responses.[10]) Eleven persons were nominated in this manner of whom ten agreed to participate. Follow-up letters were then sent to confirm the date, time and place, which was usually their offices.

Each interview lasted for roughly two hours. The conversations were tape recorded in their entirety (except for one which, for inexplicable reasons, was only partially recorded. The interviewer's nightmare!) Tapes were then transcribed, and relevant portions of each interview were returned to the interviewee for final addition or correction. The edited texts became the basis for Chapter III of this report.

Interviews were done with leaders in two states, Victoria and South Australia. This is a distinct limitation to the study. Nevertheless, the focus of the study is Federal policy not State policy. Australian states are perhaps not quite as different from one another as they are in the United States. Certainly differences among Australian states in school finance are not as great. And, as will be evident in Chapter III, South Australia and Victoria can be located at different ends of a continuum on several dimensions.

An even more serious limitation is the nature and small number of persons interviewed. They are all in official positions, and most of them are in high official positions. This virtually guarantees that interviewees will hold official views; hence, the study can in no way be considered as an independent, unbiased or even particularly critical examination of school policy except insofar as organisations are officially critical of one another. The nature and number of interviews means that nuances, atypical situations and narrow problems will not be uncovered, or worse, could be over-emphasized. Views of students, parents, teachers and others may be quite different from leaders' views. The actual implementation of the school aid policy, and the many problems entailed therein, is not a focus of this study, although comments on this are included.

But these limitations belie a certain strength. Emphasis is perhaps not so much on the way things really are but, in James Herndon's idiom, "the way they're s'posed to be". The ideal is captured here even if the reality, in all its ramifications, is not.

There is, of course, a possibility that even certain important official views have been omitted from the study. There are organisations in Australia with substantial numbers of adherents whose views would not be fully represented in this research. Some of these alternative views were gathered from the literature review and from the informal interview process described just below. But the interviewee selection procedures, plus conversations and staff seminars at U.N.E. have checked the researcher's perceptions as the work was in progress. And he is convinced that Chapter III fairly well documents the "establishment's" views on school aid policy, but not all non-establishment views.

To bolster the study further there were some two dozen informal, (not tape recorded) interviews with additional informants. Many of

these persons might have been identified by the formal, reputational procedure described above, but were not. Many other persons were repositors of specialised information relating to one or two questions on the interview schedule - eg. university professors, school accountants. These persons provided additional information orally and were extremely generous with photo copies of data in their possession. Other informants provided references to literature which was more generally available. In this connection, librarians at the University of New England, the University of Adelaide, the Commonwealth Ministry of Education and the Australian Teachers' Federation were particularly helpful. Comments on some of the more general literature will be presented here.

Among the excellent general histories of Australia are the one volume edition by Russel Ward[11] and the essays of Manning Clark.[12] These historians point out some fundamental religious differences in early Australian and American settlement.

The role of religion in nineteenth century Australian education is a particularly controversial subject. The novice is fortunate that the topic has been carefully researched with an unusually high degree of scholarship. Jean Ely's account is particularly critical of prevailing trends.[13] Her work and outlook belong to the left wing and are similar to those of Michael B. Katz in North America. The books by Percy Partridge,[14] A.G. Austin[15] and R.J.W. Selleck[16] would be typical of the many excellent middle-of-the-road views, what Ely might call the "Whig" interpretation of history. They cite evidence supporting a thesis that progress has been gradual but fairly steady. Partridge's identification of emergent trends proved to be especially prescient. Fogarty's two volumes on Catholic education are classics of their genre, and a balance to latent (and sometimes not so latent) anti-clerical views.[17] The books are so comprehensive that they serve almost equally well as

histories of Protestant and government schools. Sociologist Helen Praetz picks up the story of Catholic education in more recent times.[18]

Moving closer to the present, Don Smart's political history of Australian education legislation is a succinct overview, adequate for persons not wishing to become burdened with detail.[19] Peter Tannock's compilation of source documents provides that detail.[20] The Schools Commission's triennial reports are essential reading both for statistical detail and policy background.[21] Being political documents as well as bureaucratic ones, they are written in a slightly more lively and interesting way than most similar publications of the U.S. Government. The Schools Commission also publishes other studies and policy documents which are essential reading.

Within the category of serial literature, Melbourne Studies in Education stands out. The article of J.R. Lawry examines nineteenth century religious schools from an administrative point of view.[22] Many other articles from this annual series could be cited.

The more specialised documents will be identified where relevant later in this report. However two of these more narrowly focused studies relate so directly to the present study, in both method and content, that they need mention here. The first of these, by Smolicz and Moody,[23] provides some independent basis for the analysis in Chapter IV, (although this writer suspects Smolicz would take issue with much of it!). The findings and conclusions of the McGrath study, which dealt in general with policy implementation rather than policy making, anticipated many of the interviewees' responses.[24]

Content of the Report

This report is written in four chapters with related appendices. The next chapter, Chapter II, contains some background information on

the schools of the two countries. A brief history forms the background for discussion of current schooling arrangements in America and Australia. Then a typology for government policy is presented.

Chapter III contains specific questions and responses given by the ten interviewees. When questions elicited convergent opinion-responses, the similarities are noted. For divergent opinion-responses the areas of disagreement among respondents are highlighted and discussed.

Chapter IV contains the conclusions and implications of the study. These observations deal with differences among respondents regarding the nature of schooling, the role of school in socialization to adult life and the role of religion and social class in school choice. The chapter concludes with a mention of some policy issues which are emerging in Australia and the United States.

CHAPTER II

Schools in Australia and the United States

The schooling patterns of the two nations have evolved differently. Public schooling as an ideal was well established in the United States by the middle of the nineteenth century. Great founding fathers of American education, such as Horace Mann and Henry Barnard, had done their work. The principles of free compulsory and secular education were spreading slowly into the more backward sections of the new republic. Later nineteenth century developments were limited to expansion of the system to upper grades and modifying the pattern to meet new conditions - eg European immigration.

Contemporary American educational historians of whatever political stripe and social orientation usually agree that, for better or worse, the middle nineteenth century was the formative era.[25] Directions have not changed greatly since then.

Some form of moral education undergirded by universal religious principles there might be. But American public schools were not to offer denominational religious instruction as part of the regular curriculum, nor were sectarian schools to receive public aid.

Although American education had set its direction by 1850, the same could not be said of Australia. The principal issue was control over education. The ideals being debated were secular, state schools on one hand versus publicly financed, denominational schools on the other. Resolution of this struggle took nearly the entire nineteenth century.

For this preoccupation with the sectarian question many explanations could be offered. White settlement of Australia did not begin until the

nineteenth century, and settlers came in much smaller numbers to the Antipodes than to North America. Throughout the century the continent was ruled from England by colonial administrations. Ties between church and state were strong in the mother country.

More important for present purposes than its famous convict origins are the religious affiliations of Australians. Settlers generally came (voluntarily or involuntarily) from Britain or Ireland. Insofar as they were religious at all, they usually belonged either to the Anglican or to the Roman Catholic Church. The various dissenting Protestant sects - Baptists, Congregationalists, Quakers, Methodists and the like - were represented in the Australian population, but not nearly in as high proportion as the United States.

The principle of state support of religious schools offended neither Anglican nor Catholic consciences. The Anglican Communion was, of course, the established church in England. And the Catholic Church of the time was highly political in Ireland, benefiting from its alliances with Irish nationalism and its opposition to British imperialism. Furthermore the Catholic Church had long enjoyed establishment in parts of continental Europe.

The American scene was quite different. No two denominations dominated there as they did in Australia. Several of the major most Protestant groups in America had a theology based on separation of church and state.

Early in the nineteenth century the only Australian schools to receive state aid were those operated by certain denominations. By the end of the century nearly all state aid to denominational schools had been eliminated. State secular schools located on a rational plan throughout the colony replaced the haphazard pattern of church schools. These were a product of sectarian struggle. But the change from religious schools

to state schools was based as much on utilitarian efficiency as on religious principle.[26]

By the end of the nineteenth century Protestants generally had come to accept the principle of government schools. And with the removal of government aid, their systems contracted sharply. The Roman Catholic Church on the other hand never accepted government schools. When government aid ceased, it brought over large numbers of religious personnel, mainly Irish nuns, to maintain the parochial system. Catholic schools not only survived their financial crisis. They continued to enrol a considerably larger proportion of Australian children than their co-religionists in the United States.[27]

By the time of Federation in 1901 the general configuration of Australian education had been worked out. The bulk of students would be in government schools offering variously some form of general religious education, or denominational instruction where provision for it could be made through local clerics. (Americans will be familiar with the last arrangement under the name of "released time".) There was to be a smaller, Catholic systemic sector enrolling 15%-20% of Australian students and an independent school sector, smaller still. It contained a regional Lutheran system particularly strong in South Australia, and in addition a number of high fee paying, prestigious schools.

Australia and United States
Education Today

Schools in both countries are organised in a K-12 grade span. Divisions within the systems are roughly comparable, with primaries and secondaries. One common Australian variation on this pattern is the physical separation of years eleven and twelve (grades eleven and twelve) into "colleges". The traditional emphasis in these two-year colleges is

highly academic, since most students are preparing for further education. Today, however, there is a broadening of the curriculum, especially for year eleven.

In both countries it is the states which hold legal powers to govern the schools, but states have exercised this power quite differently. The U.S. practice is for states to delegate considerable responsibility to units of local government. These nearly 16,000 local school districts usually hold some taxing authority as well as authority to hire teachers, and to set curricula and other policies.

Australian states have tended to retain considerably more authority. School districts do not exist as such. Teacher assignments and budgets are set at the state level. But some diversity is embedded within this apparent uniformity. School Principals have some leeway over curricula and discipline, and schools typically impose small fees in varying amounts which are deductible from Commonwealth income tax.

The national governments of both countries entirely lack constitutional power over schools. Such powers as they do have derive from their financial support. The Federal Government of Australia provides large amounts of general aid, while the United States provides none. Both Federal Governments have active special purpose grant programs. (See Table 2.1 below.)

A general summary impression would be that, as between schools for the same age/grade level, Australian states are more diverse than U.S. school districts. But region-to-region differences would be greater in the U.S. due to localised financing there. Centralisation has been increasing in the U.S. while decentralisation is a current Australian trend.[28] Thus the differences in this regard may be narrowing.

Table 2.1 contains some comparative statistics for the most recent

available year, usually 1979. Small differences should be interpreted with caution because national definitions vary.

TABLE 2.1

Selected Statistics Relating to Schools in Australia and the United States

Statistic	Australia	U.S.A
School enrolments, K-12	3.0 million	46.6 million
Percent of totals in non-government schools	11%	22%
Annual current expenditure per government school pupil[1]	$A1377	$US1823
Revenues for education by source:		
Federal	9.5%	51.5%
State	43%	48.5%
Local	47.6%	
Percent of product given to education (including tertiary)	6.4% (G.N.P.)	6.1% (G.D.P.)
Average annual teachers' salary[1]	$A15,840	$US15,040

[1] at time of this writing $US1 = $A1.15

sources: Digest of Education Statistics 1980 and The Condition of Education 1980. Washington: National Center for Educational Statistics. passim
Australian Students And Their Schools and Schools Commission Report for the Triennium 1982-84. Canberra: The Schools Commission 1979 and 1981. passim

The most obvious distinction is the huge difference in the pupil populations of the two countries. This reflects the difference in their overall populations, 14 million compared to 225 million.

The proportion of the pupil population enrolled in U.S. private schools is only about half the Australian proportion. They have been creeping up a percentage point or two in very recent years, but are not yet close to their historical highs in either country.

One additional statistic is helpful in interpreting the rest of Table 2.1. That statistic is enrolment persistence. (Table 2.2.) At fourteen nearly everyone is in school. But two thirds of the

TABLE 2.2

School Persistence, Australia and the U.S.

Age of Person	Proportion Remaining in School	
	Australia	U.S.
14	97.9%	98.4%
17	32.1%	91.2%

sources: Digest of Educational Statistics, 1980. op. cit. Table 60.
Australian Students And Their Schools, 1979, op. cit. Table 3.28.

Australian population have left by age seventeen, while nine of ten in America remain. These retention rates are a composite of all three sectors: government schools, Catholic schools and others. Retention rates within the three school sectors vary considerably. And these will be discussed in the next chapter.

Retention rates help explain some of the apparent anomalies in the remainder of Table 2.1. Australia appears to devote a bit smaller share of its national product to education than the U.S. devotes,

although international computational differences make this observation especially questionable. If Australia does spend proportionately less, part of the explanation lies in the small size of year eleven and twelve enrolments, and, of course, the relatively smaller proportion of the population engaged in tertiary study. Australian teachers teach smaller classes than their U.S. counterparts, particularly at the secondary level. Yet they receive higher salaries.

A final major difference between the two countries is school size. The average Australian primary school enrols only 225 pupils or so, the average secondary school around 600. In the U.S. the comparable figures would be much higher. This difference is explained mostly by Australia's population sparsity, but partly also by deliberate policies. Rarely do high schools exceed 1,000 students even in city areas. This matter will be taken up in more detail in Chapter III.

Non-government school data is included within the general, national data given above. The rest of the data presentation deals specifically with the private sector.

At the outset it must be emphasized that private school data is less available in the U.S. than it is in Australia. Thus international comparisons necessarily are quite incomplete. Indeed, one side effect of government aid to non-government schools in Australia has been greater data availability for that sector. When aid is given, schools have much greater incentive to supply bureaucracies with completed reports and forms, and bureaux have much greater incentive to collect data!

On most indicators the non-government school sector is more diverse than the government school sector. This generalisation applies in both countries. Some private schools spend more than public schools in the respective country, others spend less. Pupil-teacher ratios are higher in the Catholic sector than the government school sector and lower in

the Protestant-independent sector (both countries).

Table 2.3 indicates some of the comparisons which can be made with a reasonable degree of precision. In both nations, non-government schooling is most often Roman Catholic schooling. Proportionately

TABLE 2.3

Non-Government/Private School Enrolments

Enrolment/pc	Australia	U.S.A.
in schools with no religious affiliation	1%	15%
in schools with religious affiliation:		
Catholic	76	64
Protestant, Jewish, other	24	36
all students in Catholic schools	17	7

sources: Private Schools In American Education. Washington, D.C. National Center for Educational Statistics, 1981. pp 1-12.
Digest of Educational Statistics, 1980. op. cit. pp 44-47.
Australian Students And Their Schools. op. cit. pp 91-106.

more U.S. students appear to attend schools unaffiliated with any religion. But this statistic should be interpreted with considerable caution because of differences in the phrasing of the two governments' data collection forms. The final comparison in Table 2.3 is the proportion of all school children attending Catholic schools. This statistic, plus the statistic for all private enrolments given in Table 2.1, suggests that non-government schools are a much more potent force in Australia than America. If numbers imply political power then the private sector is much stronger in the Australian scene.

Enrolment breakdowns by denomination within the Protestant sector are not given here. They would not be too insightful since no group in either country enrols more than five percent of the private school population. The one exception is the Australian Anglican Communion, which enrols about eight percent of all non-government school students. Considering Australia's variety of public policies toward the school aid question, it is interesting to note that the proportion of the overall school population attending government or non-government schools has remained quite stable for nearly a century. That proportion tends to hover from 20% to 25%. And three-quarters of these can be relied on, at any one time, to be enrolled within the Roman Catholic sector.

Federal Aid to Non-Government Schools

In the United States private schools do receive some indirect assistance from the Federal Government. But with the exception of school meal programs no Federal funds flow directly. Current interpretations of the U.S. Constitution bar such aid. So, to obviate this difficulty, Federal statutes require that Federally financed materials and services first be acquired by public schools and then shared with private schools. Whether direct or indirect, most aids are for the following purposes: (1) culturally disadvantaged children (2) instructional materials, counselling and guidance (3) school lunch and (4) special education.

Statistical data on private school finances is not available; hence the dollar value of these shared services going to private schools is not known. But the National Center for Educational Statistics does have data on private school participation rates, and its survey shows that Catholic schools participate in these limited Federal programs in a higher proportion than other private schools.[29]

Australian aid is much more substantial and the policies are multifarious. Only a bare outline can be given here.

One place to begin recent aid history is with the Liberal (Americans read "conservative") Menzies Government in the 1950's. At that time small tax deductions were granted to parents who paid fees for their children to attend schools. Similar to the Reagan plan in some respects, tax deductions did provide some financial relief while at the same time avoiding legal entanglements between religions and the state. A problem, however, was the regressivity of the scheme. Since the Australian income tax is progressive, higher income groups received progressively higher deductions. And expansion of this plan incurred strong criticism as a result.

One group of critics opposed aid in principle believing that only secular, government operated schools should have taxpayer support. (This of course had been the prevailing Australian view since Federation.) A second group wanted to redirect non-government school aid in favour of the neediest schools and away from wealthy individuals. It was most often the Catholic schools which were low spending, had larger classes, fewer materials and so forth. Many people viewed the needy schools position as a pro-Catholic position.

The Australian Labor Party (A.L.P.) contained a large proportion of both thoroughgoing secularists and Catholics. School aid bitterly divided the party for a time. A second Labor Party was formed, and neither Labor Party proved too successful in national elections.

But when Gough Whitlam (A.L.P.) was elected in 1972 he had a mechanism in mind for addressing the problem. In its simplest form the plan was to get the contending parties around the same table. A group of education experts was appointed to advise the government on school

policies, and that body of experts contained wide representation from all school sectors. A feeling arose that the sectors either would move ahead together or they would continue to bicker with each other. But if they followed the latter course Federal Government financial initiatives would be severely constrained for lack of *political consensus*.

This policy body, which evolved as the Schools Commission, was able to coalesce all groups around a school aid proposal based on "relative needs", (1973). Henceforth the overall amount of Federal aid would increase sharply. Aid would be parcelled to the non-government schools in inverse relation to their spending per pupil, (to be explained in more detail below). Federal regulation of non-government schools would be held to a very minimum, requiring only financial and enrolment information necessary to compute school aid.

The distinctions within the non-government sector systems are important ones to understand at this point because they are constantly referred to in the interviewees' statements in the next chapter. Non-government schools may opt either for independence or for association with a system. Independent, that is, non-systemic schools in this context, receive aid directly from the Commonwealth Government based upon the financial and enrolment characteristics of their schools. Schools which opt to join a system receive no Commonwealth aid directly. But their system receives aid based upon its composite characteristics. It is the system which then divides government aid among its member schools. Systems, of course, exert very substantial control over all aspects of school operation: staff salaries, parent fees, budgets, curricula and so forth. System membership implies a fair degree of uniformity in the financial sense at least.

By far the largest proportion of system schools are Catholic schools.

But there are some Protestant systems and some non-systemic Catholic schools as well.

The Schools Commission's original recommendation proposed no aid for "category one", high fee schools. However parliamentary compromises resulted in some government aid for this group. Thus, virtually all Australian primary and secondary schools receive some government aid, and have done since 1974.

The formula has changed since its inception, but it has always classified schools and systems on the basis of relative need. The first step is to determine the level of recurrent expenditure in government schools. All non-government schools are compared to this standard. At present those spending considerably less than government school standard are classed as group 3, those at or near government standard as group 2 and those above government standard as group 1. The figures shown in Table 2.4 are an example only, not quite correct in all states but close enough to illustrate the principle and the rough percentages. The figures come from a 1981 Schools Commission proposal which was turned down by the government.

TABLE 2.4

Government Aid to Non-Government Schools On The Basis of Need

Category of School	Percent of government school spending level permitted	Commonwealth Aid	State Aid
Group 3	up to 90%	40%	20%
Group 2	90-100	30	20
Group 1	above 100	20	20

source: Schools Commission Report for the Triennium 1982-84. op. cit. p57.

Most schools including the systemic schools are in the neediest category.

Total Federal aid to both government and non-government schools is shown in Table 2.5. The Table indicates both financial totals and the categorical aid programs which are not discussed here. Non-government schools receive the majority of Commonwealth funding. However state contributions, which are not on Table 2.5, go mainly to government schools. When total revenues are considered, the seventy-eight percent of students in government schools receive about eighty-nine percent of all public revenues. The twenty-two percent of non-government students receive eleven percent of revenues.

TABLE 2.5

Financial Allocation For Australian
Non-Government Schools, 1981

Federal Programs	in $A,000
Government School Programs	
General Recurrent	$229,671
Migrant Education	28,548
Disadvantaged Schools	21,867
Special Education	14,340
Capital Grants	118,737
Non-Government Programs	
General Recurrent	318,006
Migrant Education	11,689
Disadvantaged Schools	3,388
Special Education	3,820
Capital Grants	41,384
Joint Programs	
Multi-Cultural Education	3,439
Ethnic Schools	3,000
Disadvantaged Country Areas	5,911
Special Education	4,778
Services and Development	15,104
Special Projects	3,546
Federal Total: All Programs	$827,237

source: Schools Commission Report for the Triennium 1982-84, op. cit.

School Aid as a Legal Question

The writers of the Australian Constitution consciously patterned parts of it on the United States Constitutional Model. Section 116 of the Australian document reads as follows:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.

Shortly after "needs based" funding began the Defence of Government Schools (D.O.G.S.) organisation challenged the law, with Article 116 the cornerstone of its case. A final decision on the matter was rendered by the High Court of Australia in February 1981. The decision upheld the constitutionality of the funding system in Australia, and in their discussions the judges discussed U.S. precedents in detail. For this reason the decision in the D.O.G.S. case has been attached as an appendix to this report.

A Typology for School Aid

Australia and the United States have adopted so many and such different school aid policies in the last 150 years that some confusion in the reader's mind would be understandable. This section of the paper attempts a clarification and summary. The centrepiece of this section is Figure 2.1, a typology for financing government and non-government schools. The typology serves two purposes. It lays out the policy options which societies have open to them in school financial policy. And it serves to fix the financial policies of any particular government at any point in time - eg. the U.S. in 1860 or Australia in 1980.

In sorting out the options there are four questions that must be kept in mind:

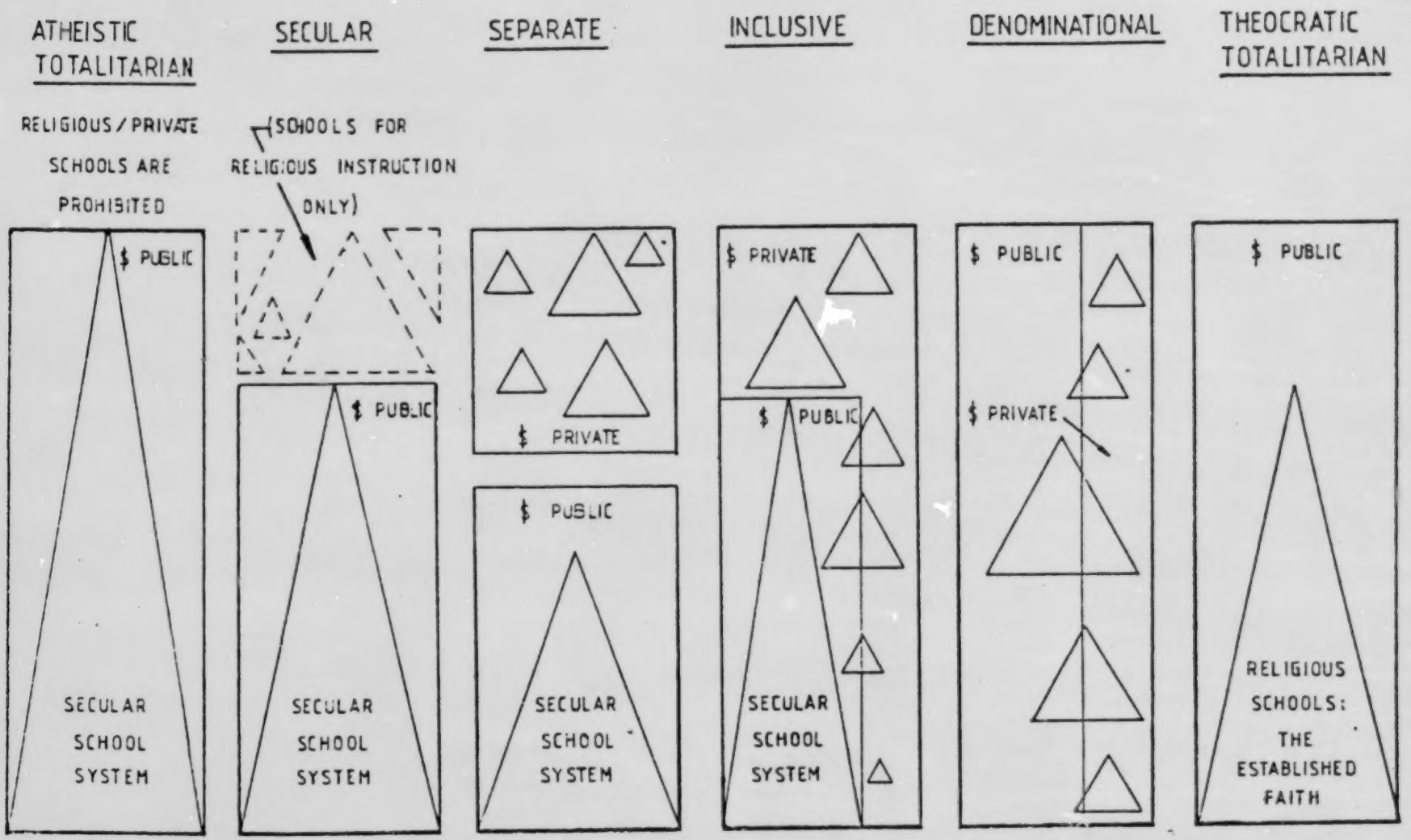

FIGURE 2.1 ALTERNATIVES FOR FINANCING GOVERNMENT AND NON-GOVERNMENT SCHOOLS

△ A school or school system administration

□ A source of finance

1. Who shall finance the schools?
2. Who shall govern and administer the schools?
3. Will there be religious schools? and
4. What provisions will be made for interaction between finance, governance and religion?

The figure provides conceptual answers to these questions. There are boxes and triangles. Boxes represent financial policy, and triangles represent the governance/administration of schools. The six model labels at the top of the figure represent general societal characteristics of the system as a whole. The words in the triangles describe particular school organisations within the larger society.

Under the two totalitarian models at the extreme right and left of the figure, schools would be organised into one monolith serving the aspirations of the polity. The only difference would be in the characteristics of the schools' governance structures with priestly control in the one case and confirmed atheists running schools in the other case. Not much more need be said here since in the Australian-American cases. These alternatives are and have been merely academic.

An important point to be made about the four centre models is that each contains several triangles. This means that there are multiple school organisations within those societies. They are, by definition, pluralistic societies with schooling options. By implication, such societies may well be democratic as well. Australia and the United States, between them, have adopted three of these four middle models at different points in time over the last 150 years.

The "denominational" model would allow several private organisations to establish schools and receive some, although not complete, funding from the state. This was in fact the model Britain followed during parts of the last century in ruling its Australian colonies. If one were modelling that specific system, for example, one would first draw four triangles overlapping the public/private line. These would represent

the four church organisations which were entitled to receive government aid - Anglican, Catholic, Presbyterian and Methodist. These four, and only these four, received some government aid. But they also took in fees and private contributions. Other smaller triangles would have to then be drawn wholly on the private side of the line. These would represent "minor" denominational organisations (Baptists, Jews etc) which operated schools but received no public aid. The denominational model could also include non-religious school organisations as well, although in practice these must have been very, very rare in nineteenth century Australia. The "denominational" model (with accommodation for private secular schools as well, is also the generalised model for the Friedman Voucher proposed in the United States. (See Chapter I.)

The next model, the "inclusive" model, is like the denominational model but for the addition of a large state administered school system. The model is labelled "inclusive" because it can include every school organisational form under the state aid plan. With the single large triangle representing the government system and the several smaller triangles representing non-government schools and school systems, this will be quickly recognised as the model used in Australia currently. If space permitted some of the smaller triangles could be labelled "Catholic", "Seventh Day Adventist" and so on.

The words "secular school system" written within the larger triangles refer to the schools' administration and governance structure, not to their curricula. "Secular school systems" may offer an occasional course in religion. (They happen to in Australia but not in the U.S.) The point is that these large, publicly financed systems are not administered by clerics. Government school principals, directors-general and so forth report to parliament, not to a bishop or an ayatollah.

Moving left, the "separate" model will be quickly recognised as the current U.S. model and that of Australia from 1900 to 1950. Separate systems denote complete congruence between finance and administration, private-private and public-public. Children may attend the large, uniform public secular system at taxpayers' expense. Or they may attend any one of a number of non-government schools, if they have the desire and the private resources. Non-government schools under this model are fully competitive with government schools in the educational, if not the economic sense. They can offer schooling for any course of study and any range of curricula.

Still further left is the entire model labelled the "secular" model where children are compelled to attend government school for the bulk of their education. Religious and private schools are allowed only for purposes of offering instruction in the particular faith. As such they are not full schools. Hence, they are put in dotted triangles with no finance box around them. They belong more to religion than to full education.

Neither country in this study is likely to adopt the secular model. But an interesting sidelight is that such a model is the current proposal of the British Labour Party. If they are successful the English non-government schools will be closed for egalitarian reasons. But no British socialist, however left wing, would advocate closure of Sunday schools. And this makes the secular system quite distinctive from the furthest left totalitarian system already discussed. That far left system might be represented by Russia under Stalin or China under Mao. Table 2.6 provides brief definitions for the five models.

Both Australia and the United States have remained with centre and right-centre school aid policies over the period covered here. And, of course, this is entirely consonant with one's expectations for these two

fairly traditional, democratic societies.

TABLE 2.6

Definitions of School Aid Forms

Theocratic Totalitarian:	One school system financed and administered by a church-state.
Denominational:	Partial public finance of several non-government school systems.
Inclusive:	Full public finance of a secular, government system, plus partial finance of one or more privately administered systems.
Separate:	Public finance only of secular government schools, private finance of privately administered schools.
Secular:	Secular government administered school system is the only legal system. Religious groups may run "Sunday" schools only.
Atheistic Totalitarian:	Single secular government school system. No religious instruction in any form is legally permissible.

SUMMARY

Comparing the two countries, Australia's school aid policies have proved the more innovative over time. Perhaps this is due to Australia's being a newer country and having that degree of flexibility associated with youth. Or perhaps the difference relates to the religious composition of the two nations.

Whatever the explanations, the fact remains that presently there are substantial contrasts between nations and between school sectors within each nation. Some of the grosser similarities and differences

have been covered in this chapter. Particularly striking are the differences in enrolment, resource allocation patterns and school persistence rates. Yet these differences occur within a similar State and Federal governance structure.

In the next chapter comparisons are limited to Australian schools only, with emphasis on the differences between the sectors.

CHAPTER III

Government And Non-Government Schools: The Interview Data

This report is comparative in two senses of the term. Countries are compared. And different school sectors within one country are compared. The first type of comparison - between two nations - is by no means new or novel. But the second type of comparison, intra-national but inter-sectorial, turned out to be something quite unusual in the educational literature. The novelty is serendipitous, discovered only after the study was designed and the literature review had been completed. But it is striking that most previous policy related studies deal either with government schools or with private schools. Rarely do they deal with both together.

The mechanism for this inter-sectorial contrast can be described as follows. Interviewees were asked to compare non-government and government schools even though they had a primary affiliation with one sector or another. They were asked to distinguish, characterise and generalise about something they knew thoroughly and intimately relative to something else from which they were a bit removed. It was felt at the outset that all leaders would have mental images of the other sector's schools, but that they might well construe events, people and ideas in the other sector differently from the way they viewed their own sector. This gave rise in the researcher's mind to an underlying question

> Do "insiders" within each sector have different opinions from "outsiders"? That is, do leaders' views of schooling differ from one sector to another in some systemic fashion, or are leaders' views largely independent of the sector to which they belong?

If leaders' views depended on the sector which they represent, they could be classified as role dependent. Statements could be made about organisational norms, school images and individual conformity.

On the other hand it was thought that leaders might opine differently from each other, but in a random pattern. In that case the leaders' personalities would play a great role; social divisions and interest group articulation of positions would play a smaller role.

The one thing that was expected was a substantial divergence of views along some lines. And for this reason the interview data was classified into two categories: convergent opinion and divergent opinion. In view of this initial expectation the actual results were all the more surprising.

In order to achieve breadth of views, it was clear at the outset that interviewees could not be selected randomly from the entire population of educational leaders. In preliminary conversations with U.N.E. faculty, it was decided that the numerically smaller Catholic and independent sectors would have to be "over represented" amongst the leaders. The sample of nominee positions was stratified and persons were asked to nominate candidates accordingly. The description of this process is in Chapter I.

Table 3.1 lists the interviewee respondents and their positions. The number of positions held by each interviewee is quite lengthy and only a few of the most relevent are cited here.

Suffice it to say that the interviewees selected proved to be outstanding leaders at various levels in their respective organisations, a fact which is not surprising considering the elaborate selection procedures. Several have state, national and international reputations. One was holder of a Smith-Mundt fellowship and former visiting lecturer at Ohio State University. Two others are advisers to foreign countries on Catholic

TABLE 3.1

The List of Interviewees with their Affiliations

Albert W. Jones	Visiting lecturer University of New England; education consultant with the Australian Capital Territory; former Director-General of Education, South Australia; former member of the Commonwealth Schools Commission.
Sr. Valda Ward	University of New England, Ph.D. candidate; formerly President National Sisters of Mercy; Principal of Roman Catholic Teachers' College and schools; government school teacher.
Mr. Hugh Hudson	Lecturer in Economics and Education; consultant to New South Wales Government Schools; former Minister of Education, South Australia.
Mrs. Diana Medlin	Headmistress, The Pembroke School, Adelaide, South Australia; present and former service on numerous state committees for non-government schools.
Mr. Bob Leane	Head, Independent Schools Board, South Australia; former government schools teacher and headmaster non-government school in Tasmania.
Mr. John MacDonald	Director of Catholic Education, South Australia; former government schools teacher.
Mr. Les O'Brien	Deputy Regional Director, Government School System, Ballarat, Victoria.
Sr. Carmel Setford	Principal, Our Lady of Christian Help Primary School, Lake Wendouree, Victoria.
Mrs. Joan Kirner	Victorian State School Parents Organisation (numerous positions and titles); former member of the Commonwealth Schools Commission.
Fr. Frank Martin	Parish priest, Endeavour Hills, Victoria; former director of Catholic Education in Victoria and member Commonwealth Schools Commission.

Education, another on music education, and so on. Others on the list serve children directly with particular emphasis on the disadvantaged school program. Still others have been inside the state education bureaucracy long enough to know it intimately.

Several respondents have had work experience in both the government and non-government school sectors, and three have service on the Commonwealth Schools Commission, the national policy making body for primary-secondary education (see Chapter II). (A fourth Schools Commission member, Mr. Ray Costello of the Australian Teachers' Federation was also interviewed. But his interview was not tape recorded.)

All interviews were conducted by this writer in July and August 1981. Tapes were transcribed and returned to interviewees for final revision in September 1981.

Table 3.2 categorizes the respondents by sector. This classification is partially artificial since several of the respondents have had significant experience with both sectors. But the classification does demonstrate a breadth of view.

TABLE 3.2

List of Interviewees According to Sector Affiliation

GOVERNMENT SCHOOLS	NON-GOVERNMENT SCHOOLS	
	Catholic	Independent
Jones	Ward	Medlin
Hudson	MacDonald	Leane
O'Brien	Setford	
Kirner	Martin	

The twenty-three interview questions were divided into five groupings. These five groupings provide the sub-headings for this chapter. All interviewees responded to each question.

General Questions, beginning of interview

1. Why is it that some parents send their children to government schools and other parents send their children to non-government schools? What considerations motivate a family's choice?

It was in answer to this first question that respondents began to take exception to the interviewer's classification of schools as either "government" or "non-government". Everyone spoke of at least a three sector division: Government, Catholic systemic and independent. Some emphasized still finer distinctions.

There was agreement that the government sector was easier to describe than the other sectors.

> I think the whole situation is over-simplified. I think it's over-simplified because we use the word "non-government" to include a very broad spectrum. I think we're in a better position to say "government schools" because you have funding, you have centralised staffing, a whole lot of things that can be said to be characteristic of all government schools. You can't do that with what is known of the non-government sector. Because in addition to those Catholic, non-Catholic, you have in Australia at the moment - I read this somewhere recently - there is an incredible number of little schools being built by all kinds of people. And they are all non-government ... so I think that whole area is just, you know, getting too messy for us to put one label on it. (WARD)

Other respondents, however, did point out essential elements all non-government schools had in common. Non-government schools can choose their students, and therefore set limits on the amount of disruption they want to put up with. Secondly, non-government schools can limit their breadth of curriculum. Not every secondary school needs to serve all types of children.

Later, when responding to the actual question posed, they named the following bases for parent choice. For government schools: they were usually closest to parents' homes, they were the only school parents ever considered using, they have the lowest fees, and they have the widest

cross-section of the population.

For some respondents this last attribute was the most positive feature of government schools.

> ... from working class to middle class, a better cross-section of cultural views, one in three of our population now is from a non-English speaking background. And that children have to cope with all kinds of contingencies in their general and social life ... I had experience myself of non-government schools ... and I really had my eyes open to the breadth of education possible. (KIRNER)

For selection of non-government schools the following reasons were given: religion, social status, academic results, sport and extra-curricular activities and prospects for future employment. Some respondents tie these together in one comprehensive answer.

> You've got to look at two different groups of parents who select non-government schools. You've first of all got parents who choose a church school for purposes of having their children educated in the faith ... Lutheran, Catholics, Seventh Day Adventists and Uniting Church now moving into parish school and so on. Now I wouldn't like to put a percentage on these.
> You've then got the group of parents whom the Schools Commission would describe as the "best buy" parents, who look to the non-government sector because of the academic performance of students, quality of teachers, the sporting programs, the discipline, the general tenor of the schools, and with all of that have an expectation that their children will be given a bit of an edge in the employment situation .. If they get a religious education as well, then that's a bonus. (MACDONALD)

Other respondents emphasize one or two characteristics among those listed above. The two reasons cited most often were religious/ethical and social elitism.

> Most of the independent schools are church based therefore they have some sort of religious and philosophical centre, a morality structure which appeals to parents. . .
> My school has a very central, ethical core which is stated. In government schools this is not a necessary, nor is it required, or, in many cases, desirable. (MEDLIN)

> I believe there are distinct status differences between government schools and at least some of the so-called independent schools. Some of the schools, where developed early in Australia's history, were modelled on the English public school. And that would be places like Geelong Grammar, Melbourne Grammar, Geelong College, Scotch College. They're the names of some of the famous public schools in Victoria ... those colleges would have been the places where, what we would call the upper classes in Australia would have sent their children. The squatters of Victoria, for instance, who are the wealthy landed gentry in Western Victoria traditionally have sent their children to Geelong Grammar. So it's a, if you like, a carry over from the English system. And it was to some extent class based. (O'BRIEN)

The statements above happen to come from persons associated with each of the three school sectors. It should be pointed out that the differences are only a matter of emphasis. All respondents mentioned all reasons at some point in the interview.

There seems to be little doubt that there are multiple reasons for parents' school choice. Not only these respondents, but also research evidence supports multiple explanations. Smolicz and Moody's study surveyed parents of three independent, secondary schools in Adelaide. Two of these were Protestant; the third was Catholic (non-systemic). All were high fee schools. (Protestant parents were most likely to respond that they chose their child's school because of "qualities of mind and character", "culture and civilisation" and "academic excellence". Catholic parents placed religion as the first reason for their choice of a particular school.[30])

Judging from the Smolicz and Moody survey parents rarely claim to be motivated by a school's snob appeal! Nevertheless, some people will undoubtedly continue to believe that elitism is a factor in school choice.

2. In your personal opinion what are the major differences between government and non-government schools?

This question implies the possibility that the respondent, as an expert educationist, will hold different views from most parents. It does not require any speculation about other people's motives but a frank statement based on personal knowledge only. It is not surprising, therefore, that this question was one of the few which elicited widely diverse responses.

Relating to pupil character

> And often, in independent schools, it's much more difficult to be a loner ... Government schools are for the loners and individualists of this world. (HUDSON)

Relating to teacher strikes

> As Bill Walker once said in New Zealand and reported back here, "They go on strike at the drop of a hat." Now that does apply on the East Coast. (JONES)

Religion

> They didn't want to feel that religion was being stuffed down their necks. (SETFORD)

Parents make the difference

> I think the general finding is that parents tend to make decisions in terms of their own experience with schooling. (O'BRIEN)

Fees bring accountability

> Parents pay tuition. They feel a greater right to say what they feel about a school. (MARTIN)

Extra curricular activities

> There are not enough, or were not enough, things in an extra curricular way that touched the children. (MEDLIN)

Staff characteristics

> Stability of staff, concern ... to be part of the school family, not just workers in a school. (LEANE)

Any categorisation of these diverse views is a bit too long a reach for this writer. The one thread common to several of these responses is that professional educators and administrators do make a difference. ~

School organisation matters; religion and social class are not the whole story.

Questions About Curriculum And Managerial Efficiency

3. How, if at all, does receipt of Commonwealth aid influence operations of government schools and non-government schools?

One very significant contrast between the Federal Governments of the United States and Australia is the degree of administrative regulation which accompanies financial aid. Australia has far less. The assumption is that professionals on the scene are to be trusted to do the best job possible. Or, in any case, the central authority has no special knowledge about the program which it should enforce.[31]

Government schools are operated by their respective states with little direct regulation from Canberra.

More interesting in this regard is the non-government sector, which has undergone some entirely voluntary reorganisation to take better advantage of the Commonwealth aid scheme. The non-government sector is more systematised now than formerly, before 1973. Some Catholic schools and others which were previously independent have now joined for financial reasons. They lose some institutional autonomy but they may get more government aid.[32]

> It has changed our administrative structure in relation to the schools. Well, we could cite the development of Commissions for Catholic Schools right across the various states ... and that plays a big role in relation to policy making, systemic schools, non-systemic schools. It has really helped us in our planning for new schools, liason with the Schools Commission etc. Where there are schools in poorer areas you can make sure they're getting access to reasonable levels of government funding, and fees can be held to a satisfactory level. On the other hand, the schools in more affluent areas can be expected to put in more through their own private resources. And the Commission for Catholic Schools can be expected to play a role in that. (MACDONALD)

While present policies are seen on all sides as advantageous for non-government schools, there is some doubt that future arrangements will be quite so beneficial. Government regulation of the non-government sector may emerge as an issue in the very near future.

> ... our organisation passed at its April conference ... a special action item to ask the Commonwealth and State Governments to freeze the current level of money until three things were worked out. One was the registration of non-government schools. Should they or should they not be registered, which is the Hare Krishna question. Two, the regulation of schools in the sense of where will they be sited... And the third thing is, we reckon, if the non-government schools are going to receive these high levels of money then (a) the Government should say where it's going to stop. Because if it doesn't stop soon, we will indeed have two sectors of education, both publicly funded, one publicly controlled and the other privately controlled and the second point is, on what conditions of accountability? (KIRNER)

Other respondents suggest other regulations as well. Thus, the days of unregulated education may be numbered.

4. Do government or non-government schools tend to have larger student bodies? Is their enrolment size more efficient? Would larger or smaller enrolments be more practical?

It has already been pointed out that school sizes are usually smaller in Australia than in the United States. This is partly a matter of population size in relation to geographic size and partly a matter of deliberate policy.

In rural areas schools necessarily are small by any standard. For example in Victoria one third of the government's primary schools have less than sixty pupils. There are some very small secondary and mixed K-12 schools too. But the proportion of them is less.

Even with such small schools the population sparsity means that some children must be transported long distances daily from home to school.[33] Small schools have been studied and been shown to be inefficient. But amalgamation would not necessarily produce reduced costs since transportation (or boarding) costs would be commensurately greater.

The contrast here is that non-government schools are not required to operate in remote areas, although some of the non-government systems do feel an obligation to do so. The South Australian Independent Schools Board serves one Lutheran systemic school with an enrolment of twenty-eight. And the situation in the Catholic sector is the same.

> Sure your little country schools and schools of less than 100, they're pretty inefficient financially and uneconomical. But these days we can manage to run those without too much of a hassle ... Economy of scale certainly is a major factor at the secondary level ... We are fairly heavily into the use of non-solid construction. (MACDONALD)

The occasional non-government school, then, is very small. But this is the exception, and non-government primary schools, on average, have substantially larger enrolments. They operate within a low cost per pupil size range.[34]

Cost breakdowns by program and for individual schools within school systems are far less available in Australia than in America. Some of the traditional cost categories are missing in government reports - eg. superannuation in the non-government sector. Although the Schools Commission is developing some data most of the information is impressionistic, based on school visits and untaped interviews. The impression is that rural schools tend to have lower teachers' salaries because they have younger staffs with lower educational qualifications. Rural schools are inherently less expensive also because they have less administrative staff, specialised personnel, equipment and so on. On the other hand, class sizes in rural areas inevitably are smaller. The net result is that rural schools are more costly than urban schools on a per pupil basis, but the differences may not be all that great. Their lower level of educational service mitigates their size inefficiencies in a financial sense. But rural schools suffer in an educational sense.

The second aspect to the size and efficiency issue relates to school policy in the more urbanised areas. Australians simply don't like "large schools" as an American would define the term.

> The school in Ballarat was becoming a, you know, a "blackboard jungle" really. Now it has an enrolment, I think, about 420 children. That's in years 7,8,9,10. Now that seems to me, as far as I can judge, a very good community size. (WARD)

America's vision of a "blackboard jungle" is a considerably larger operation than 420 pupils. But government sector figures were about the same.

> I don't think that, at the government level, I don't think the planning ever really takes the efficiency of operation ever excessively into account. I suspect that not too much consideration is given in the Australian set up. Insofar as it is considered it is considered in the design of a new school. All right, here we have a new primary school, we would like it to be on the order of 500 to 600 students, a new secondary school, 900 to 1,000. (HUDSON)

The rationale is that smaller schools are more personal and individual.

5. How do the two school sectors compare with respect to range of course offerings, facilities and specialised personnel?

Responses to this question elicited widely divergent - in fact opposite - views. Opinions divided along no clear lines, however. The two quotations which follow are from government school leaders.

> Well again I think government schools outstrip the others by far. Or they used to. And I think still would.
> When I left the department we had got one ancillary staff to five teachers. Now that would be unheard of in a non-government school. And that is even in the best type of non-government school. (JONES)

> I visited Geelong Grammar School and then, within a few weeks of that, visited Melbourne High School. Geelong Grammar School perhaps one of the best of the independent schools, Melbourne High School, certainly the prestige school in the state system at the time. And the divergence between the resources supplied and the range of programs supplied was quite incredible... sports, drama music etc....In comparative terms I think the government would be forced into a "no frills" approach. (O'BRIEN)

But this divergence of opinion is a bit less stark than it may seem at first. There are some points of agreement. First there is agreement that the poorly resourced Catholic schools have improved their position a lot in recent years. This has been entirely due to government funding. Differences between the Catholic sector and other sectors would have been very marked ten years ago, but are much less sharp today.

The independent, high fee sector is difficult to compare with the others because of the unique ethos that exists there. Older buildings and facilities are often prized since they help support the ideals of tradition, continuity and reverence for established ways. Specialised personnel such as psychologists, counsellors and remedial teachers are not needed in such numbers because children with special problems don't attend these schools. Shop and commercial subjects aren't as necessary either. To be sure some non-government schools do offer advanced academic studies and social experiences which are not available in government schools. But Geelong Grammar would not be typical in this respect. Perhaps Kirner summed it up best, "It depends where you're looking."

6. How do salaries and other benefits in non-government schools compare with those in government schools?

Government schools teacher salaries are not determined through collective bargaining as they are in the U.S. They are determined in a quasi judicial process, and in a manner similar to salaries for other industrial workers.

Since "need based" Commonwealth aid in 1973, non-government teachers' salaries have reached near parity with government teachers. As government teachers' salary awards increase so do salaries on the non-government side. The automatic nature of this process for the non-government sector has certainly reduced the threat of industrial action, but it has caused some resentment on the government side.

> If I was a government school teacher I'd say the government school teachers go on strike and the non-government school teachers accept it. In other words, ... by and large the non-government teachers have got parity. The government school teachers set the running and the non-government teachers come in behind them. (KIRNER)

The major differences between sectors are in the non-salary areas. Non-government teachers may teach more classes per week and extra-curricular assignments are a condition of work in the non-government sector whereas the government sector depends on teacher volunteers.

> And the staff are committed. I mean the unions wouldn't like what our staff do I'm sure. Some of them get to school at 7.30 in the morning. They're on duty through lunch time. They might teach nearly all day long. Then they'll take a footie practice after school perhaps two nights a week and spend the whole of Saturday afternoon with that team. That doesn't happen in too many high schools. And that happens right through the whole school. (MEDLIN)

Private superannuation schemes are not nearly as generous as those in the government sector. On the other hand the academic year in non-government schools may be a week or two shorter and the school environment may be more conducive to teaching-learning. Thus, while the salaries are comparable the nature of the job differs considerably.

7. Can you compare the level of academic achievement of students in the two types of schools? If the two school sectors are different in this respect what accounts for the differences?

From the data presented in Table 3.3 it is clear that Catholic and, especially, independent school students have higher academic qualifications. The contrasts are quite sharp. Less than a third of government school leavers leave with a high school graduation credential. Whereas in the independent sector the proportion of high school graduates is almost equal to the average in the United States. (The Higher School Certificate is the main qualification for entry to tertiary study, but by no means the only entry ticket.)

TABLE 3.3

Student Persistence Rates by Sector, 1978

School Sector	% of Students Remaining to Year Twelve
Catholic	43.1
Independent	85.5
Government	29.6

source: Australian Students And Their Schools, op. cit. p52 and "Highlights".

The first point to be made in reference to this data is that government schools do not claim to be as academically minded as most non-government schools. The government sector must serve children with all kinds of interests, non academic as well as academic.

> In the government schools we've got to take all and sundry ... the non-government schools see that academic goal there whereas I think the academic goal is not the only goal in the government sector. (JONES)

> My eldest son particularly was not working at what we would call his capacity. And people said to me, "You know, he'd finish with four first class honours if he was at a non-government school." And I said, "Well, maybe so, but that's his choice." (KIRNER)

That academic achievement is proportionately higher in the non-government sector there can be little doubt. The question is why this should be so. And explanations fall into two broad categories: home-related and school-related. The school-related explanation emphasizes the academic climate of the institution, homework, teachers' caring attitudes, or alternatively rigid discipline. The home-related explanation emphasizes parents' aspirations for their children, ability to buy them material advantages, reading to pre-school children at home, and so on.

Significantly, none of the ten respondents accepted either explanation

in full. They seemed to accept both explanations simultaneously.

A Coleman type national study recently completed in Australia examined the relationship between school sector and student achievement. Home socio-economic and environmental variables were statistically controlled.[35] The study showed predictable results, but it is the interpretation of them which is interesting.

> The Council for Educational Research has shown that the performances of children in Catholic and non-Catholic independent schools in the basic skills areas, in literacy and numeracy, have been better. What impressed us when they took areas in which we bring in a high number of children from Southern European, migrant families. That their performance in our schools was relatively good compared with government schools. Now again, it may be that the parents are again more interested in those kiddies. Maybe the bond that's there helps the teachers do a bit more on behalf of those kiddies... And that may be the factor rather than the skill of individual teachers... we've got good teachers and some that aren't all that hot. We have our open space schools and our traditional schools and so does the department... but I think that teacher who is trying to do his best in our school gets support from the parent group. He gets support from the school board. And maybe that makes him do a better job. (MACDONALD)

The issue of academic achievement is extremely political in Australia as well as in the United States. Indeed one non-government respondent considered the results "unfortunate", at least in a political context.

> Unfortunately, it has been noted over the years that higher academic places, in total percentage, for the children from various sectors, have come from the non-government sector. And this has caused a little bit of a problem. The board and our Catholic colleagues go out of our way to try not, publicly anyway, to discredit each other ... That could be because of the clientele. In general our schools have a slightly different clientele. People who are upward mobile. (LEANE)

The facts of the situation appear to be incapable of exploitation by any group. Non-government schools cannot claim to be superior by their nature since public opinion might shift against them to the "underdog". But government schools cannot ask for more resources on

the basis of their poorer academic showing either. The public might shift pupils and resources to the more "effective" sector.

Even though this is a quiet issue, the broad facts are known to those parents who are interested. And achievement results may partly explain the recent small gains in non-government school enrolments.

8. Can you compare government and non-government schools in terms of the way they prepare students for vocations and avocations? What accounts for the differences here?

Youth unemployment has been a major problem in Australia in recent years and educators have developed programs to assist in the transition from school to work.

Even though they feel the education system has done what it can, these respondents believe that the root cause for unemployment lies in economic conditions. Blame placed on the schools is unfair.

One economic reason for youth unemployment is the changing nature of the job market.

> If you read the papers and listen to Malcolm Fraser and the politicians, both sectors do it badly ... Society is demanding much more today in the way of literacy and numeracy. Now they have to read figures on machines and so on ... Now they are people who are unemployed today because they don't have sufficient skill, which their counterparts never did have anyhow, but now they just can't get jobs. In the good old days, in the golden years when everyone knew the three R's, like hell, they got jobs because there were the sort of jobs available which didn't require the sorts of skills that are required now. (JONES)

A second reason for youth unemployment is the world wide economic recession. Those lowest in the social order are the first to lose jobs and the last to regain them. School leavers have little chance.

> In Victoria we've made a real effort to make the school and the work scene relate to each other. We've got now work experience programs running in nearly every one of our state secondary schools, and that, of course, can give kids a better understanding. But of course, it's a major furphy, not furphy, major story, to a major lie, to say that schools can do much about unemployment. They can't and so we have in the west which is a working

> class area twenty-two hundred kids to every one job vacancy, and in the east forty kids to every job vacancy. And so I say it's generally class and geography rather than the kind of school. (KIRNER)

If these explanations are right, the success of transition education programs will await improvement in the general economy.

The non-government sector is currently enjoying greater success in placing school leavers, although their explanations for success are not inconsistent with the explanations given by government leaders.

> Surveys that we've done show us that a very high proportion of those kids who go through our school gain employment ... A lot would have to do with the way in which that teacher, who is responsible for that career guidance, and the head of the school works with local employers, local business, local industry etc. to see how the students might fit in ... to find a niche... It's harder for the government school people to do that. I wouldn't say that our people are all that much more skilled. But I'd say that their efforts are more productive because they've got a slightly better climate in which to do that. It's easier for our people with their parent connections and so forth. (MACDONALD)

Differences between sectors are equally sharp in the extra-curricular (avocational) area. It is not so much the number of activities offered, but the schools' philosophy toward participation. In the non-government sector extra-curricular participation is usually mandatory for all children. In the government sector participation is voluntary (for both teachers and pupils).

> I would have thought that that was where the major difference in externals, that people would see, might occur within the school. The children are expected to take part in sport ... not necessarily competitive sport ... but something that will make them healthier ... there is also quite a thrust in community awareness or community involvement ... so that a child is given some sort of skills in leisure living ... the school is considered by some people to be your life. The education department schools tend to provide activities which children may or may not become involved in. (LEANE)

As one respondent said "school is a way of life" in the independent

sector, and to a somewhat lesser extent, in the Catholic sector too. But this is viewed as a mixed blessing. School may be taking over too many functions best left to the family. The press for conformity can hinder the unique character development of young men and women.

> We've had a big think about outdoor education and learning for leisure, those sorts of things. We haven't done this on our own, I mean there are plenty of high schools that have done exactly that. Let me say, that I think it's a disgraceful comment on society in general that families leave all these sorts of things to schools. I think if we didn't feel we had to have an outdoor education program, it would be better. I think if Dad's and Mum's went off weekends with their kids ... then the schools wouldn't have to be doing them. I think that the family structure and the competitive nature of keeping up with the Jones ... I'm not going to have any more kids at this school am I.. and the material values that have intruded upon our society have left the real things, the eternal values to schools when it should be parents who are doing these things. (MEDLIN)

> An independent school has a greater emphasis on things that are organised for the school as a whole, like sport ... One distinct advantage of the government schools is that the kid doesn't have to be there outside the hours of schooling and is not expected necessarily to play any part in association with the school outside the school hours. (HUDSON)

Here, then, is one of the clearest inter-sectorial contrasts, to be considered in more detail in the next chapter.

9. Satisfaction with schools is hard to discern, I know. But how would you characterise the attitude of Australian school students? Are there differences between the public and private sectors in this regard?

Respondents interpreted this question in two ways: as contentment with life in school as a daily experience and the feeling that school was a good preparation for adult life. Differences in responses are a matter of emphasis and tone.

> Even in the best non-government school it's pretty hard to be enamoured of a system that puts you through six hours of academics a day ... and I think the government school system was earlier in recognising this as a problem and developing answers. (HUDSON)

> If you are asking me whether I'd say the kids in general love Pembroke, I think they do. I think they identify with it. (MEDLIN)
>
> Satisfied, if you mean by that people who belong to a relatively privileged class coming out self-satisfied. Obviously, it's inevitable. (O'BRIEN)

To this writer it appears that government schools are a more satisfying place to be; non-government schools are more satisfying as a preparation for adult life. This conclusion is based not merely on the quotations above but on respondents' answers to other questions, particularly the ones on achievement and avocations (questions 7 and 8). Non-government schools are more demanding academically and after hours. Students may not particularly enjoy themselves all day every day, but they are participating for the sake of their futures. This case may be a bit over-simplified but it does seem to summarise the tone of the responses.

Recent public opinion polls provide an interesting perspective from parents and other adults. Over three-quarters of the public rate non-government schools good or excellent, while less than two-thirds rate government schools good or excellent.[36] However this relative superiority of the non-government sector is not surprising since attendance there is a voluntary exercise. Only those who want to participate in that sector do, in fact, participate.

10. Do State Government officials periodically visit schools for inspection purposes? How do these visits work exactly? Are there differences between the government and non-government sectors in this regard?

Inspectors have not paid official inspection visits to the non-government sector for some years. Hence the phrasing of this question was inappropriate. However, the question did elicit some interesting responses about the professional relationships between government and non-government school personnel.

The degree of inter-sectorial cooperation is considerable. State

department consultants are encouraged to share their services with non-government schools and routinely do so. In a like manner non-government school personnel are sometimes seconded to the state agency.

Cooperative efforts of this type are generally limited to support staff personnel, curriculum coordinators, school psychologists and the like. Classroom teachers are not seconded. But to the extent interchange does occur, it breaks down human barriers and lack of understanding.

Particularly in South Australia leaders rarely express themselves in terms of "them" versus "us". The sectors are clearly demarcated but cross-overs for certain purposes are the norm. One very unusual example of cooperation is the campus at Aberfoyle Park in suburban Adelaide. At that site government, Catholic and Uniting Church primary schools will be planned and constructed in complete cooperation. The schools will retain separate identities but share playing fields, libraries and other expensive but specialised facilities in common.

11. What sorts of reports and forms are schools required to file with government agencies? Are there differences between the two sectors in this respect?

As was said above, the amount of paperwork required of Australian schools is small in comparison with American requirements. The interviewer heard stories of complaint, but no complaints were made directly to him.

One item of information volunteered by one respondent was the basic report form used by the Catholic system, filled out for a particular school. A copy of the report could not be made available but a careful reading indicated that the particular Catholic system in question was engaged in its own equalisation scheme, shifting money from school to school completely independent of the Commonwealth Government. The Catholic scheme appeared to be even more equalising than the government scheme, although this generalisation is highly tentative being based on one

case only.

Other interviewees corroborated the observation that the Catholic systems do shift considerable private sums to poor parish schools. But to the best of this writer's knowledge Catholic school finance has received little study.

12. Clearly one distinction between government and non-government schools is that the latter charge fees. How large a burden are these fees? Do they vary from school to school or family to family within the same school?

Fees in non-government schools would range from roughly $100 to $3,000 per year in 1981. Some boarding students would pay more. Low fee schools are usually Catholic systemic schools. High fee schools are not part of any system, which means, by and large, that they are Protestant schools of the "mainline" churches: Anglican, Presbyterian and Wesleyan. There are exceptions to all these generalities: some high fee Catholic independent schools, some low fee Anglican schools, and some Protestant systemic schools. But the picture above is generally correct.

Government schools charge fees too, but much lower ones. Fifty dollars per year would be considered quite high in the government sector. Small fees are deductible from personal income tax, but for families that would find even these a burden there are abatements.

Catholic schools frequently charge a family fee. All children after the first enrol free of charge. There are variations on this plan. For example, Protestant schools may offer a reduction for the second or third child.

Respondents agree that low fees do not impose an undue burden on most parents. For the indigent parent, non-government schools have evolved very interesting ways of coping.

> Some schools I know say, "This is the maximum school fee you can pay, this is the minimum." And they let families choose what they are going to pay... We, on the other hand,

> try to encourage a family to pay something - reduced fees, say $50 per year. Some say they'll pay something. They don't pay anything. We don't ban people from school because they don't pay fees. (SETFORD)

> But not always on paper is the situation the same as it is in practice ... Just speaking of our place and speaking of the Ballarat Grammar (Anglican) School, that both of us, just having spoken with the headmaster at various times, that both of us would have quite a large number of, well in business you would call them bad debts. But they're simply people, and we usually, you know, people come to us and say, "Well look," - quite often they don't come, you quite often have to approach them and say, "Well look, you know, we'd love so and so to go on in our secondary school." And they say, "We can't afford it," and we say, "Well look, you know that's what the Sisters of Mercy are in business about." To give people an opportunity, particularly if the parents are not anxious to send them to the government school, for whatever reason.

> Interviewer: And this particular Anglican school in Ballarat would operate similarly?

> Answer: Yes. You see we're on the edge of a very large wool area one way, wheat area the next. We've been hit over the years with very bad droughts and all schools would carry country people ... I know a couple of years ago somebody sent me a cheque for $5,000. Now that was just, it was fifteen years since his girls had been in school, he'd had a lot of bad years and sort of couldn't pull things up. But he knew that we were trying to - that disadvantaged school I was telling you about - do something to that. And he sent which was a good deal more than he owed the school. But we've found that most people are very honest, you know. In time they pay for it. (WARD)

Finances appear to be taken care of in a fair but highly personal manner. And to some this may seem preferable to the highly impersonal mechanisms used by governments.

But does everyone who wants to really get to go? A concern would be whether private arrangements work well in a sufficient number of cases. Both these respondents come from Western Victoria. One certainly could not generalise about all schools based on this evidence.

Other respondents, particularly in speaking of the urban based

independent schools, gave the more expected response.

> Well I'll make a heretical statement for the head of an independent school. For most people there is no choice. They couldn't afford to send their children here. (MEDLIN)

Case after case was reported where mothers went to work to finance their children's non-government school education.

13. What are the social implications of fees? Do they make non-government schools different from government schools in any sense?

Here respondents identify a difference between the low fee, mainly Catholic systemic schools, and the high fee independent schools. Catholic respondents, and others speaking about the Catholic sector, find little or no Catholic-Government difference. But every respondent mentioned the social distinction between high fee independent schools and the rest.

> I remember my daughters when they were teenagers, going to a party for the Searle boys, my partner in writing Maths books; the Searle boys went to Prince Alfred College and a, they had a party for one of their birthdays, I think it was, and of course most of the girls they invited were from independent schools. And some of these girls got around to asking my daughters what college they went to, and a, they told me afterwards, "And we said, of course Norwood High School." "Ooh, ooh, what, Norwood High School?" You know, they just couldn't believe it. (JONES)

> Look, I hate the question and I hate what I have to answer. I'm sure it does. But one thing I want to make clear though. There's no free education any more in this state. I don't know if anyone's put that to you. There are fees that are levied that are put on every family ... which they have to explain away if they can't afford them. (MEDLIN)

The government school fees to which Medlin refers are of course the activity fees mentioned above. These are very small by comparison, but they do put Australian government schools in a different position from the U.S. public school. And they clearly provide a talking point in any political debate.

14. Some people in the United States assert that fees make schools more accountable to parents and children. Are non-government schools, on average, more responsive?

Whereas the previous question might be thought to imply some underlying bias against non-government schools, this question may imply some bias against government schools. The latter obviously have a wider clientele than just parents and children. Government schools must please taxpayers and parliaments as well. Perhaps for this reason they cannot be as responsive to individual families, or so it was reasoned. Non-government respondents accepted the implication of the question and agreed that their sector was more "accountable".

> Because parents pay tuition they feel a greater right to say what they feel about school. And on the other hand I think it gives, the school feels a greater need to be accountable to the parents. I think it establishes more of a contract between the two with obligations and rights on both sides really. (MARTIN)

It was pointed out that non-government school administrators hire teachers for an individual school. If enrolments decline those teachers may be unemployed. Government teachers are part of a state service. If enrolments in a particular school decline they will be transferred elsewhere.

> Well, I've got to say this, although this is against government schools. When I was superintendent of recruitment and training I introduced a lot of in-service training courses for teachers and always invited the non-government school teachers to come to them. In fact I think I had a representative of theirs on the committee that I had set up to, you know, supervise this. And I complained to their principals, their headmasters, they call them, or headmistresses, that they weren't letting them off during term time to come to these courses. So consequently, when a course was held in term time it would be 90% government school teachers, 10% non-government. In weekends and on vacations time the percentage was reversed. So I do think that you must say, on that thing, that the non-government school teachers do show a greater

> degree of dedication than the government school teachers. Now the quality of the teachers, except for the top people, was not high ... And I know some duffers we had in the state service were able to get jobs in the independent sector. Now that is, admittedly before they got funds.
> I think that government schools are the leaders in progressiveness in education. Now I don't mean progressiveness in that way out sort of deal. But I do think you'll find that in the Modern Language Teachers Association, Science Teachers Association, English Language Teachers Association, the leading figures are from the government sector. (JONES)

This implies that teacher excellence in the government sector is more associated with pedagogical skills, and the non-government sector more associated with personal dedication, time spent above and beyond duty's call. Teaching in the non-government sector, in its ideal form, implies a certain selflessness almost religious in its implication.

Two respondents quarrelled with the implication of the question: that non-government schools were more accountable. The following response is typical.

> I find it strange to often have to support non-government school parents from here, 'cause they don't have a non-government school parents' organisation who actually will take their case on expulsion or parent involvement. We have much more parent involvement in our state schools than they do in Catholic schools.
> I believe that the elite school model is the market model. Somebody puts up a package for you and you buy it or you don't. But you don't get much say on how it's wrapped or what it looks like. Now I guess if a whole mess of consumers said, "We don't like that, good bye," then they might change a bit of it. But by and large the individual parent, if that's what you're asking me about, doesn't have much impact on Melbourne Grammar. And they buy the package. (KIRNER)

One possible interpretation of the responses in composite would be to distinguish between accountability at the individual level and accountability at the institutional level. In the non-government sector schools as institutions work to distinguish themselves slightly from one

another. They seek to have a distinct image or in Kirner's language a market niche. Parents then shop around to find the best match between school and child. Government schools on the other hand are more like one another. They must be, because equality and comprehensivity are the social ethic in which they operate. But people not only want to be treated the same. They want to be treated differently too. Parental and political pressures require that government schools constantly re-adjust in small ways - a new course here, a different pupil assignment there. Accountability must be within the institution because there is really only one institution.

15. Is there a tendency for certain racial or ethnic groups to be concentrated in certain schools? Are the concentrations more pronounced in government or non-government schools?

This question was inappropriate insofar as it concerned different races. Limitations of this study made it impossible to get to the remoter parts of Western Australia and the Northern Territory which have the heaviest concentrations of Aboriginal population. No comment upon their education can be made in this study. This limitation is unfortunate, since Aboriginals constitute the main disadvantaged racial minority in Australia.

Australia also has a large South Asian population, but these groups have migrated voluntarily (except for political refugees). They come with a fair degree of skill and are spread fairly randomly throughout the general population.

With respect to ethnic groups the perceptions tended to be quite similar. All respondents reported concentrations of ethnic groups within certain schools. But these are due more to residence patterns than to deliberate school policies. (South Australia recently eliminated strict zoning of government schools.)

Catholic and government systems both operate some schools with high

ethnic concentrations, usually Italian or Greek.*

Independent schools contain many fewer identifiable ethnics. And the few ethnics that do attend do not wish to be known as ethnics.

> The I.S.B. type schools don't attract a really large number of ethnic children ..Some of the Catholic schools do attract ethnic children. In fact three of the schools recently were a bit disturbed to find that because of a questionnaire sent from the Commonwealth Government, they were eligible for funding for the English as a second language program. But as I've observed, the parents don't want that. (LEANE)

A certain proportion of ethnics, then, clearly want full integration into the dominant Anglo-Saxon-Irish culture. They are not looking for a separate identity. On the other hand there are identifiable Anglos who want their children to have school exposure to various ethnic groups.

> My daughter brought her class photo home and she was about the only recognisable Anglo in the group. I believe that there's a whole realm of human experience that the barrier of fees places on kids in elitist schools ... My whole concern about the government, non-government thing, is not a religious concern or a cultural thing. I'm a multi-cultural person, whether that's religious or whatever it is. (KIRNER)

The one generalisation that seems safe is that Australia is following no fixed policy with respect to the ethnic integration question. But there is certainly too much ethnic separation for the convinced multiculturalists.

16. Do different social and economic classes attend different schools? Or is one school likely to contain equal representation from all economic classes? Are non-government schools different from government schools in this respect?

This question uncovered no particularly new perceptions not covered in answers to other questions. It did give respondents who cared to a chance to set out a clear social class orientation.

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* Greeks, of course, rarely belong to the Catholic faith. Still many Greeks prefer Catholic schools. And so do many Muslims. About 12% of South Australian Catholic school population is non-Catholic according to MacDonald.

> I would love to swap for twelve months the kids at Paran High with the kids at Scotch College. They're not very far away from each other. And let's just see how they go. I reckon that if the teachers at Scotch College had to deal with that range of learning, family support and resources that you'd get a very similar result. But they don't have to deal with that, do they? (KIRNER)

The government and Catholic systemic schools contain roughly the same socio-economic cross-section of the population, according to respondents. It is only the high fee institutions which are markedly different in this respect.

Questions on Financing, State Control And Religious Freedoms

17. Are there certain identifiable groups or sides taken on the issue of Government aid to non-government schools? What are their rationales?

The politics of non-government school aid has shifted considerably since February 1981 when the High Court rendered its judgement in the D.O.G.S. case (see Chapter II for further explanation.). There seems no chance that the Australian courts will become involved in the aid issue again in the near future, but the issue has moved back into the legislative arena.

The issue is discussed below in historical, religious and social terms.

> Well, in the political arena both major parties, the Liberal Party and the Labor Party, have accepted state aid as a part of their platform and accepted, in fact, increasing state aid. With the Labor Party it's on a basis of need; with the Liberal Party the needs issue is disappearing. It's just on per capita. In fact, probably better than per capita. The Labor Party, although some members of it might prefer not to have it, they would depend so much on the Catholic vote ... and a lot of the politicians and trade unionists are Catholic people. The Liberal Party, well, can't afford to let the vote go entirely their way. And, of course, the Catholic groups have got very big lobbies. Now their lobby is split into two parts too. There's the group dedicated to the cause of Catholic "posh" schools, then there's the other group which is all for helping the parish school. Let these other schools fend for themselves, and so on. So there's a difference in attitude there. (JONES)

> I think you'd find a lot of people who'd probably be like myself who don't like the differentials in our society that are engendered by the development of the government and non-government system, and who would probably maintain that the government system was set up, out of taxpayers' money, to provide the opportunity for students to be educated. And that those people who chose the non-government system had the right of choice, but couldn't expect to be paid out of taxpayers' money.
> I think beyond the groups like D.O.G.S., there'd only be that vague dissatisfaction about the nature of the arrangements.
>
> Interviewer follow-up question: Does anybody get up and say, "My heart bleeds for Geelong Grammar?" I mean, who supports government aid to non-Catholic, or even Catholic well-to-do schools?
>
> Answer: I think, a, how can I answer this? Again, my answers are not particularly considered ... I think particularly through the party in power, if we regard the Liberal Party as representing the wealthier and the middle class proportions of our society, talking in class terms, that relatively advantaged sections of our society ... to some extent it's the party of vested interest protecting the concerns of those people with vested interests. (O'BRIEN)

Accentuating the historical divisions are a number of considerations of more recent vintage. Considerations are all mixed together in the responses indicating to the researcher that the newer issues have not yet been fully articulated and isolated for separate identification and discussion. They are emerging issues.

Speaking first of the original 1973 Schools Commission, first Martin:

> And the problems on the religious level were sort of shunted aside by the egalitarian sort of thing really, that cut down the wealthier sectors in order to build up the needier sectors. And they were perceived to be both the Catholic and the government schools ... There was a bringing together of people under that kind of policy who previously had been opposed to aid to the non-government sector, many of them because of the class thing but mostly, probably, because of the religious thing. But they put aside that kind of belief. Now I think the position is changing again. Because I think that there isn't that confluence of views of the Teachers' Federation and the parents and so on, in favour of

the Catholic schools that there was ten years ago. Because in the meantime the Catholic schools have been brought up through funding they've got, they've been brought up to a level much closer to the government system itself. (MARTIN)

... I think they've got the potential answer there in the Schools Commission, because I think the Schools Commission was an absolute masterpiece really, to put together the people who were leading the fight in various sectors and let them sit around the table and try to work out something was just masterly really. Don't you reckon?

Interviewer follow-up question: Well we're not here to solicit my views, but I er, a, suspect that the process is quite different when one is talking about dividing a smaller cake each year ..

Answer: Ah yes, I agree. But I think it's just a degree of difference really rather than one of kind. (MARTIN)

And then Medlin:

There are some people in the community who object to any money at all going to non-government schools on the grounds that they are divisive and elitist and all the things that you can add. This is a philosophical thing rather than being a real thing, and ...er...you know, we could argue it philosophically and in reality and I could even take opposite sides in both cases.
But even so there are some who don't believe that. There are still some who believe that, perhaps, within the non-government sector even though they believe in the principle they believe that there are still some whose needs are zero. You know, there could be something in that too. So one other philosophical thing too is how it's being done ... I think it's very significant, the people who were on that first state advisory committee, with that first $250,000, gave no money at all to high fee-paying schools. It divided it all up amongst the Catholic schools, the little parish schools at Port Adelaide and so on. This school, and others like it, got no money at all. So I'm very glad that started that way because it showed people were responsible and understood what the concept of the word "need" was.

Interviewer follow-up question: Now you didn't say this, but I'm inferring from what you said that if the money were short, that schools like this one would be among the first to go off the list.

Answer: Yes, I would say this to you if there were

> no government funding then Pembroke would get nothing, too. If there were no government funding then of course Pembroke would get nothing, so I'm reductio ad absurding ... What I said to you then was something to establish the credibility of the understanding of that first committee of what the word "need" meant. I'm now saying to you that ten years have since passed, and now, there is no better equipped school anywhere than the best equipped very, very poor Catholic schools ... They have made, certainly in capital terms, the most incredible advances whereas the high fee-paying schools have not. And why have they not? Because they can't afford it. Because it all comes out of the private purse. So now you're really asking me the question, "How would you reduce your educational offerings? What would you first do to make this a worse school than it is?"
>
> Interviewer interjects: Oh, a, I suppose maybe that was the implication.
>
> Medlin: Now wait a minute. Now, I think that's the implication. Because the ball game ten years later I hope has to be different from what it was ten years ago. Otherwise we've failed in making educational availability to those that had a very poor go. We've failed. They're going good now ... So needs change, money changes, schools change. (MEDLIN)

After this long slough through the data let us try to pick apart the main lines of argument. First are the dual themes which by now must be getting quite familiar: religion and social class. Are non-government schools providing the young with socially necessary religious values? Or are they dividing members of society from each other through school attendance based on wealth? These issues emerge in response after response but they are central in answering this political question. And they will be treated more fully in the summary chapter, Chapter IV.

A second line of argument deals with declining real dollars for education and the shift of Commonwealth revenues increasingly to non-government schools. Is this a reflection of narrow political interests? Or does it merely reflect the legitimate wishes of the people who are voting with their feet in favour of non-government schools?

Third there are the qualitative improvements in Catholic schools.

In the last ten years these schools have improved teachers' salaries, reduced pupil teacher ratios, broadened their course offerings, improved existing facilities and opened new schools at faster rates than the government sector. Under these conditions has the original Schools Commission concept of "relative needs" changed? How relative is relative?[37]

Finally, there is the fiscal argument. Independent school users pay heavy taxes. Are their children entitled to government financed education at the school of their choice? The practical consideration here is that all schools have now been structured on the basis that aid will continue to flow. A loss of aid would create organisational havoc. Many schools would close. Can or should a nation try to go back again to the way it was before?

These are not offered as rhetorical questions in a literal sense, but as questions which will frame the political debate in Australia. The centrepiece of that debate in the immediate future is likely to be regulation of non-government education. The argument is that if schools are to get so much public money they should "act" more like government schools.[38] For more on the regulation debate see question three above.

18. Do Australia's financial aid plans have a primarily secular or primarily religious purpose? Or do you ever discuss it in those terms?

Question eighteen was included because it has constitutional implications for America. Any aid law which is interpreted as furthering religion is unconstitutional.

The Australian Constitution has been interpreted differently. Government aid for the support of a particular religious denomination would be highly suspect. But aid for non-government schools generally is constitutionally permissible.

Insofar as they consider the question at all Australians consider that the purpose of aid is secular.

> In the years when the education standards within the Catholic schools deteriorated, because of the burgeoning class sizes, there's little doubt that what suffered was education and not the religious instruction. I don't know that religious instruction within Catholic schools suffers very much if class size goes from thirty to sixty. Education suffers. (HUDSON)

> Well, there's no distinction made about the aid. The aid goes to the school and what goes on in the school. (MARTIN)

> So I think it's much more of a secular thing about who shall be the leaders of society ... I think it's a bit of a furphy to talk about some of our grammar schools as being religious based. If they turn out Christian businessmen, so be it. But they're on about turning out businessmen, not Christians. (KIRNER)

From these responses it is clear that the aid is not viewed as religious. But the secular character of aid is viewed with varying degrees of approval.

19. How do religious observances and courses of study differ in government and non-government schools?

Both the public and private sectors do offer some religious education. As was described in Chapter II, government schools offer variously some form of denominational instruction taught by clerics within the local community or a comparative religion/ethics-type course, which may be taught by regular staff.

It is generally acknowledged that most religious instruction in state schools is quite unsuccessful.

> Some of the worst classes I've ever seen, which did some of the worst disservice to religion that you could possibly imagine. (O'BRIEN)

> If enough ministers come in on that day for classes to be dispersed, we go in, maybe, and just work on camps and things in that half hour. You can't do anything in half an hour (per week). (WARD)

The difficulty here is that the goals for religious education in government schools are very unclear. People feel strongly, but in different

ways. For example a recent survey indicated that about 90% of the population want some religious education. But they are thoroughly divided as to what form it should take. Denominational instruction, the most widespread system at present and the one to which the quotations above refer, is the most popular. But a quarter of other people want "general religious education" and ten percent want comparative religion only, according to a recent study in New South Wales.[39]

In a society which appears to have growing concerns for religious and ethical values, government schools' inability to deliver satisfying religious education is surely viewed by some as a defect. And studies suggest that this defect explains some of the growth in non-government schools.[40] The problem is lack of societal consensus; hence, it is no fault of the schools. But the fact that government schools are victims rather than perpetrators of this societal dissensus in no way relieves them of the problem.

Non-government schools offer religious instruction as they like, perhaps one, three or five times per week. Religious assemblies are common in the non-government sector but supposedly prohibited in government schools.

Of particular concern here is whether or not a fixity of religious views preclude presentation and discussion of ideas inimical to the particular religion. If certain views are prevalent in the rest of society but discussion of them is prohibited by a particular faith, some would consider the child's education to be neglected.

Accordingly, this-follow up question was posed to those involved in Catholic education: "Let's take a controversial issue like abortion. Would there be an attempt to bring a pro-abortionist in?"

> Actually this question came up last year. It was decided that the school had no obligation to

> represent this value which was completely contrary to the views of the church. (WARD)

> ... now, I think the issue has to be discussed by students. And they have the right to know the pros and cons. But I would not be happy to have those issues being, say initially, brought to the mind of the student by somebody who was unsympathetic to the Catholic viewpoint ... on the other hand we'd probably be just as cross with the teachers if they didn't bring in, in subjects like abortion, other views. (MACDONALD)

Opinions then would clearly vary even within educational administrations of the same faith.

The third, independent sector would be quite different in this regard than either of the other two. The mainline Protestant establishment schools would tend to stress, not any narrow sectarian view, but broad and general Christianity as a cultural tradition and an ethical framework for guiding behaviour today and in the future.

> Let me answer you as far as my school's concerned. I believe that parents want the value system that a religion espouses which in this country happens to be a Christian religion. I don't know what percentage of our families are church-going people, but whether they are or not, I believe that's what they want for their kids ... some central, almost dogmatic authority of what is right and what is wrong. A reference point to which they can refer back. Now you might say that sounds like a humanistic thing, well, and, a, perhaps it is. The wisdom that one can get, say from the Bible or the Koran or wherever you like is something that I think most of our families want their kids exposed to ... But whether you're asking me whether it's something to do with the established churches as we know them, then I would say perhaps that's not the reason they send them to this school. (MEDLIN)

This answer might not be quite typical since Pembroke is not affiliated with any denomination. But other responses corroborate that this sort of statement would not be far off the mark for the independent sector.

The summary picture which emerges here is that the non-government sector is catering successfully in this regard for its special clientele.

The government sector offerings are a compromise, greeted with public apathy rather than enthusiastic acceptance.

20. Do schools attempt to separate the religious from the secular in their teaching methods or curriculum content? Do government schools differ from non-government schools in this respect?

This question, like question eighteen, relates much more to the American scene, since strict separation is not legally required in Australia. Government schools view their curriculum and instruction as secular. Non-government schools aspire, in general, to suffuse their teaching of secular subjects with an underlying religious and ethical base.

> Once upon a time we tried to make a big thing of religion and put it in a little box on its own. Now students see religion as part of a much broader perspective. It's not something separate. (WARD)

> I suppose I see separate subjects. But I see an overall philosophy of your school which creates a binding effect, a Christian attitude. (SETFORD)

Comparing these responses with the responses to question eighteen posed us with a problem in logic. The purpose of aid is to support curriculum and instruction. Curriculum and instruction intermingle the religious with the secular. The purpose of aid is very clearly secular. How can this be? But never mind. Politics and religion are not matters for logicians.

21. Do questions of agnosticism, atheism or atypical religious beliefs ever arise in the context of schools or their financing? Do these considerations ever touch on academic freedom or religious liberty?

This question deals with societal limits on tolerance. How far should a nation go in financing school variety? Should it finance even those educational institutions which are inimical to its best interest?

These questions have not yet arisen for full policy discussion. But the issue is just surfacing in 1981. A Hare Krishna school recently applied for government aid in New South Wales. And after some discussion, the school did receive public funding. Respondents believe this one case will lead to others.

> I think it's going to be a major issue. Well I was talking to our minister the other day, Hunt, and he's a supporter of non-government schools, but he's getting worried about the proliferation ... I think that while the establishment is happy to be getting its kind of schools funded ... the other day, where one group of Baptists were saying, "Well, you should be opposing a fundamentalist Baptist school being set up." ... I'm not going to get into their arguments but at least they thought that we might get into that inter-nicene argument. I'm sure that's not just agnosticism, atheism - although I do wonder, if the Communist Party wanted to set up a school whether it would be allowed to - it's a question of particular religious biases. (KIRNER)

> It hasn't, but I think it's going to ... and, a, I get a bit concerned that I hear from America about this accelerated Christian education material which is so, to me at any rate, so soul destroying and anti-social in its approach. (LEANE)

In Australia as in America the fastest growing private school movement is the fundamentalist schools. In this connection it should be mentioned that non-government schools do not qualify for government aid as soon as their doors open. It may take some time for a new school to get on the list even in the current, unregulated system.

In America as Australia fundamentalist schools grow without public subsidy. This fact suggests that there are no simple relationships between government policy and school choice. Much of what happens will happen despite, not because of, government policies.

General Questions, end of interview

22. What would you say are the effects of non-government schools on adult society in Australia? Are you better or worse because of them?

This question clearly did divide respondents but not according to clear lines of school sector affiliation. All of the non-government administrators supported aid. Responses of government school leaders could best be characterised as ambivalent.

> I'm a bit ambiguous about this, Tom. I think if you'd asked me this five years ago, I would have taken a fairly unequivocal line in saying that I don't believe there's a place for a non-government system at all. I think I would have taken a more doctrinaire, egalitarian-type stance.
> Perhaps I've become a little less doctrinaire, a little more tolerant about diversity ... I don't like elements in our society which divide people on class or other bases. There is a genuine commitment to an egalitarian society which is supposed to underlie our perception of democracy in Australia. And yet part of democratic ideals, I guess, ought to include tolerance of various kinds, racial, religious and otherwise. So probably it's inconsistent to be objecting ... (O'BRIEN)

> Worse off. Largely because they're divisive so far as the community is concerned. They tend to be elitist, they tend to reinforce socio-economic groupings or classes that already exist. Having said that, the off-setting characteristics ought to be made clear. Until more recent times, government systems of education have been too bureaucratised, too centralized, and too much the same from school to school... Now that is a pretty severe restriction on choice, and I suppose the existence of independent schools has increased the range of choice, at least for those who can afford to pay fees.
> ...Oh, well, if I had my absolute preferred system, they wouldn't exist. But it's a system I wouldn't impose. I wouldn't push people around to that extent. I'd just like to see the government schools compete the ass off all non-government schools ... I just want the kids to come out of government schools, and stick their nose in the air and say, "Well, we're the lords of creation, not you bastards." I think the education system ought to be a system that is capable of shuffling the deck around a bit in terms of counter-balancing the effects of class, who your parents were. (HUDSON)

There is some recent scholarship supporting the remarks made above. Studies have found that a few non-government schools produce a disproportionate number of Australia's leaders. But this finding is somewhat balanced by the finding that a few government schools also produce more than their share of elites. Under any interpretation of this data, it would be hard to deny the existence of roughly two dozen schools which produce a disproportionate share of the Australian elite.[41]

Returning again to the question, respondents' views in the non-government sector are about what one would expect. The following statement condenses it simply and eloquently.

> It has made us generally speaking more tolerant, you know, of other people ... in the sense that people had the right to send children where they wanted to. And people could feel, "We're not all being drafted. We have got some sort of an alternative. We're not all being drafted to the same spot." (WARD)

23. In America as in Australia there is considerable difference of opinion as to how governments should finance schools. Knowing the Australian experience so well, how would you advise us?

All respondents were knowledgeable about the American scene generally. And several had been consulted by American experts. This was one area where responses did diverge along sectorial lines.

Direct responses ran the gamut from "don't do it at all" to "adopt Australia's present system" to "adopt tax credit or voucher proposals."

Only one (government) school leader advised that the U.S. retain its present system of no government support for the American private sector. Catholic leaders tended to prefer Australia's present system to any other and felt America should adopt a similar system. Independent school leaders would prefer the Reagan type tax credit plan. These divisions are generally right, but they do not apply for every respondent.

The following quotation is cited because it presents a view not often heard in the United States.

> I'd fundamentally want to argue though, when it comes to a question of state aid, that every child has a right to a decent standard of education. That, one, it is an improper act of government to visit the sins of parents, if they're regarded as sins, onto children and to say, "Well we know you're getting a lousy education, but because your parents have chosen to send you to this school, and they have a choice to send you somewhere else where you get a good education, we're not going to assist you." That is something that I find anti-educational and improper. (HUDSON)

Here we have an entirely secular rationale for aiding religious schools.

SUMMARY

There is a very high degree of convergence among these ten leaders' opinions. Communication among the school sectors is free flowing. Each group knows what the other is up to and how they think. Taken together these facts pretty well lay to rest the question of "insider" versus "outsider" knowledge posed at the beginning of this chapter. People in one sector hold opinions remarkably similar to those held by persons in any other sector. And the overwhelming convergence of opinions may well be the study's most surprising finding.

The remainder of this summary is devoted to drawing a composite profile of the respondents' answers. The composite is on a topic-by-topic basis rather than a question-by-question basis. Differences amongst responses will be pointed out where relevant. But the overwhelming impression is one of similarity among them.

Parents choose non-government schools for a variety of reasons, but the two most important are social and religious. Religious considerations are likely to be more important for Catholic and systemic schools; social considerations are likely to play a bigger role in Protestant and independent schools.

Government aid has had no special regulatory effects on non-government schools in the sense of requiring them to do what they otherwise would not have done. But pressures for more regulation are emerging. The chief effect of aid to date has been on the Catholic sector, which has achieved much more satisfactory resource levels over the last eight years.

Government schools are more comprehensive than non-government schools in two senses of the term. First they must operate everywhere including

small rural schools in every corner of the nation. Small schools impose additional per pupil costs not required in larger schools. And, since non-government school aid (which goes mainly to larger schools) is based on what government schools spend per pupil, there may be some bias. The second sense in which government schools are more comprehensive is course offerings at the secondary level. General, vocational and special education curricula impose costs on the government sector which the non-government sector does not have to provide. Its clientele are more academically oriented.

On the other hand non-government schools do have extra curricular sport, religious and cultural activities for which pupil participation is required. Supervision of these extra activities is expected and is a condition of teacher employment in non-government schools. Such activities are not required of teachers or pupils in government schools. And this would be a major difference between the two sectors.

Student academic achievement is higher in non-government schools, due to their more selective clientele and to the emphasis which those institutions place on test success. Students in such schools tend to be satisfied because their education is a bit more likely to lead to social and financial success later in life. But they may find their school days to be extremely demanding. Government schools allow their students more free time after school and on weekends.

School fees are a problem in several ways. The high cost of some schools means that most families can't afford to send their children. This in turn creates social distinctions between "haves" and "have-nots" which carry over into adult society. On the other hand, some lower level of fees may be desirable, partly on the "user should pay" principle and partly on the accountability principle. Parents may take more interest if they pay out of pocket and institutions may be more accountable to

parents and children if they are paid directly, although some respondents disagree with this.

All sectors cooperate in supply and use of instructional support personnel - eg. coordinators of curriculum, psychologists. This cooperation helps break down administrative and personnel barriers which otherwise might exist. But present levels of cooperation are threatened by budget cuts.

Religious observances are not permitted in government schools and religious education has been a big curricular problem. Non-government schools do not have to face this problem because they do not have to cater to all sorts of religious persuasions and non-religious attitudes.

The Catholic Church is a strong supporter of non-government school aid. Protestants are more variable. All major political parties are supportive, and the judicial issue has been settled in favour of aid. For all these reasons Australia is very likely to continue to fund non-government schools, in some form, for the foreseeable future.

CHAPTER IV

Conclusions, Summary And Implications for the United States

The previous chapter analysed interview data in terms of the twenty-three questions posed by the researcher. This procedure certainly has its uses but it also imposes a significant limitation. It obscures the respondents' own classification schemes, their own analytical frameworks.

Therefore in Chapter IV we examine the same data from the viewpoint of categories that respondents themselves offer. This analysis together with that in the previous chapter then makes it possible to offer some general summaries and conclusions about the nature of schooling in Australia and, by implication, the United States as well.

The process followed in this chapter is much more tentative and subjective than the question and answer format of Chapter III. The analytical procedure deserves brief mention here.

First the researcher attempts to cast aside his own thought categories (in this study, the twenty-three questions). Then he reads the entire testimony of each respondent several times from beginning to end without regard to the question that the particular respondent is answering. Was a respondent returning to the same topic again and again throughout the entire interview? If a topic was raised again and again regardless of the question being asked, that topic was called a "thought category" for that interviewee. Such topics organise thinking and therefore speaking. They are an underlying reality for that person, helping him to compose his views about schooling.

This procedure is followed for each of the ten interviewees. Then the ten lists of categories are compared. Do the same categories

emerge for different respondents? (This decision is the most subjective part of the procedure. Whatever categories the researcher chooses as labels, no two people think and speak exactly the same.)

Among the ten respondents in this study the thought categories were remarkably alike. This may be partly an artifact of the procedure, but it makes sense on other grounds as well. The similarity in backgrounds and present positions, the free flowing information and communication among school sectors, and the factual context all suggest that these ten individuals ought to organise their thoughts along similar lines. It would be surprising if they did not.

Thought categories are used to organise thinking. But this does not mean that respondents necessarily have similar substantive positions in any particular category.

Teacher strikes provide a good illustration of the entire procedure. None of the twenty-three questions in the interview schedule dealt with strikes, but they came up repeatedly in all interviews but one. The following two quotations illustrate how substantive differences can emerge within the respondents' own thought categories.

> I think too, now, there is becoming an element of the fact that teachers in state schools go on strike.

> This is a rather significant thing. One of my deputies ... had four brilliant sons. Three of them became medicos and one became a school teacher. One of the medico sons phoned his father one day and said, "Dad, I know you'll be disappointed in this, but I must send my children to an independent school because I never know when they're going to have a teacher in front of them at the government school." And there was a fellow whose whole tradition had been state school oriented. (JONES)

> Now I think if you've got your kid at a state school, you don't worry that much about strikes unless it's wildcat ones ... you live with strikes if that's the decision you've made. If you're looking for an excuse to send your children to non-government schools, then

> that's a good way to argue. But I really don't believe strikes is the reason. I believe it's part of the rationalisation. (KIRNER)

Of course the different points of view are clearly drawn in this case. More often the differences are subtle, as one would anticipate from the data analysis in Chapter III.

Generalisations About School Sectors

In the questioning, respondents were asked to characterise entire educational sectors. They all expressed the view that their generalisations would be incorrect in specific cases. Despite this caveat respondents felt there was something to be gained from generalisation and sectorial characterisation.

Interviewees felt most comfortable in generalising about questions dealing with law, finance, politics and administration. These categories seem to be the ones which distinguish government and non-government schools most uniformly and completely.

Another area for generalisation was people in schools. These answers dealt with people's motivations, their family backgrounds, aspirations for the future, recreational and general attitudes toward society. Respondents' thought categories in these areas were similar. But their responses tended to show more disagreement on the substantive issues.

A third set of thought categories dealt with classroom environments. There respondents were most reluctant to generalise. Apparently, excellent teaching and learning occurs within all sectors. Unfortunately, so does the inferior variety.

As a general rule system administrators found generalisation easier than school principals. This is not surprising. It merely reflects the

different nature of leadership activities at the two levels. Principals are more oriented to the problems of curriculum, pupils and staff relations. System leaders deal more with politics, law and finance.

Two Constructions of Reality: Religion and Social Class

This section deals with differing social orientations which underlie choice of school sectors. Considerations here relate to philosophy, law, finance and politics.

Religion and Freedom of Choice

Non-government leaders believe their schools serve a fundamentally religious or ethical purpose which is based on Judeo-Christian traditions. This purpose transcends the mere daily activities of the school. Or perhaps it would be more correct to say that the core purpose is reflected in all daily activities. In either interpretation, the core purpose achieves its importance because of its permanent nature. Children will first internalise this higher purpose to their lives, then carry it with them long after they leave school. It will sustain them throughout adult life.

This, of course, is an idealisation in the sense that not every single child will be so affected. But the ideal does justify the schools existence in the respondents' minds. It is what activates principal and staff each day. It motivates policy and practice. Even if some parents seek temporal advantages for their children more than transcendental ones, still the latter do rub off along with everything else.

Religion and ethics, of course, are not altogether a matter for the school. They must be fostered in the home as well. And since homes differ in the attention they give to this matter, one school - or one type of school - is not for everybody. Schools should vary according to family tastes and families should match themselves to the right school.

But this privilege should not be left to the very rich. Everyone should have the opportunity, and the only way to effect this is to give tax funds to various privately administered schools.

The ideal, then, begins with the individual not society as a whole. A good society starts with good individuals. And good individuals emerge from free choice in schooling. If a few families choose inappropriately, too bad. But individual error is far preferable to state compulsion. In this sense participation in the non-government school ideal is entirely voluntary. The ideal is not undermined if some people choose not to accept it.

Social Class and the Commonwheel

The government school accepts the values of the secular culture. As an institution it takes no stand on the transcendental questions but is concerned instead with life on earth. Traditions of all sorts play a minor role; guides for activity come from the rapidly changing comtemporary civilization, not from any fixed view of life.

According to respondents the role of the government school is to act as an independent force in the child's life. It should not merely reflect the values held by a particular family. It should broaden the child's view by exposing him to the culture as a whole, not one narrow part of it.

The government school must, therefore, be socially comprehensive if it is to achieve its expressed social mission. In order to get the breadth of views and experiences of each social group it must have children from all social groups. If only low income students attend, the government school cannot fill its mission.

For this reason social class tends to be the most frequently mentioned category in government leaders' responses. The mingling of various social classes in school seems to fulfil the same role in govern-

ment leaders' responses that religious values etc fill for non-government leaders. They are the most often mentioned topics. They seem to be the over-arching consideration.

The emphasis on social comprehensiveness means that the ideal of the government school is much more constraining on individual members of society. Non-government schools can get along fine without participation from large segments of society. But government schools cannot. If all recognizeable groups do not participate in government schooling, including the upper classes, its social ideal cannot survive. If non-government schools are financed too generously government schools will not be comprehensive schools but pauper schools.

The Rebuttal

The positions of each sector are of course known to the other. Government school people have particular difficulty with the religious argument in the case of the high fee Protestant schools. If religion is so important why do Protestant denominations have schools which a majority of their communicants cannot afford to attend? (The answer would be that separate schooling is not required in the Protestant religion.)

Others reply that government schools are mediocre and uniform. Comprehensive they may be. But in trying to be all things to everyone they aren't really satisfying to anyone.

How much variety is in the common interest? The conflict between the religious/ethical and social class arguments cannot be reconciled but only compromised.

The Nature Of Schooling

In this section we consider people in schools pointing out some of the major differences in institutional arrangements for students and teachers.

Personality Development And Student Discipline

Since school values in the non-government sector are relatively timeless, they don't change with the whims or fashions of the present generation. Student character is something to be shaped along well defined lines. And non-government schools have the mechanisms at their disposal to do so. Number one in importance is parent interest and home support. Second is a more controlled school environment. The non-government school can decide on the maximum amount of disruptive, socially-deviant behaviour it wishes to tolerate. Third is academic emphasis in the curriculum. Fourth, after school activities like sport and drama are compulsory. And fifth, moral and religious education is integrated into the curriculum.

Government schools do not have these control mechanisms to the same degree, and their student development goals are different. They want each child to mature and develop along the lines that child wishes for himself with appropriate advice not only from parents but from other parts of society as well. In the government school it is not so much a question of conformity to their pattern as finding your own pattern. This may be less rigorous but more enjoyable.

Academic Achievement

Non-government leaders realise that academics are the major consideration for most of their parent clientele. Therefore these schools are mainly for academic pursuits, particularly at the secondary level. Respondents believe that non-government schools probably start with brighter students and then place them in an atmosphere where expectations are high. Even for those not going on to tertiary study the demanding atmosphere is still a good preparation for entry onto the labour market.

Academics are certainly an important part of government schooling,

but they do not play the same central role that they play in the non-government sector. According to respondents government school parents don't always expect their children to do well in school. They hope they will. But they don't expect that they will, because parents' own school success may have been limited. Government schools offer all sorts of studies besides strictly academic ones in order to help children find what they are best at.

Staff Attitudes And Activities

In non-government schools the teacher is the main link between the educational ideal and the daily life of the child. More than anyone else it is up to the individual teacher to shape the child's personality. Hence school teaching is considered a vocation. Teachers must put in long hours not only in the classroom but in sport and other activities. Since students are generally highly motivated to learn, actual teaching skills are less important in this sector than in the other sector. Teacher personality and character are more important.

Responses referring to government school teachers fall into two thought categories which might be labelled "professional" and "industrial worker". As a professional the government school teacher is likely to have developed more teaching skill than his colleague in the non-government sector. He spends more time planning lessons and is in touch with the very latest trends in his teaching field. Since his students are not necessarily highly academic, it is up to the teacher to give his classroom an exciting and stimulating atmosphere.

The government school teacher in his role as industrial worker has a rather different reputation. He is not required to see the children outside the classroom, although he may organise activities voluntarily. He goes on strike for higher wages and shorter hours. (To date teachers in the other sector have not done so.) The degree of actual hardship

caused by strikes is in much dispute. But strikes do create in some minds the image of a teacher as a bureaucrat with a clock-watching mentality more concerned about the conditions of work than the work itself. This of course is a stereotype not a quotation, but it does serve to identify one of the major attitudinal divisions which exist in Australian society.

Choice And Conformity

Both sectors emphasise choice and conformity, but in different ways. In the non-government sector schools distinguish themselves from one another. They offer a slightly different range of courses, extra curricular activities etc. in a hope to attract families. The choice comes in matching a particular child to a particular school. But once there the student is expected to conform to its rules and procedures. He is expected to participate in many activities. He must integrate himself fully into the character of the school.

In the government sector one school conforms pretty much to every other. It doesn't matter much which school the child attends. But once in school the child has a greater chance for self direction and development. There is no one image for the school and fewer behavioural norms to be followed.

Thus in the government sector there is conformity among schools but choice within them. In the non-government sector there is conformity within schools but choice among them.

Classroom Environments

The final set of thought categories deals with pedagogy: learning theory, curriculum and instruction. Respondents agree that these are important considerations. They distinguish individual schools from one another, but not entire school sectors.

Catholic and independent schools tend to be a bit more traditional

in their teaching and learning methods than their government school counterparts. But very experimental schools also can be found in the non-government sector. There is no one Catholic curriculum or government school teaching method. Teaching method, then, seems to be more a matter of pragmatism than of social class, philosophy or religion. And different forms of pedagogy are adaptable to a wide variety of school administrative forms.

Emerging Policy Issues For Australia

The policy questions currently facing Australia have been mentioned as appropriate throughout this paper. They will be summarised briefly here.

The D.O.G.S. organisation based its case on the potential for social cleavage along religious lines. In retrospect this claim proved to have little factual support. There was no evidence found in this study that Australia today is particularly divided along religious lines. Gone are the scurrilous schoolyard rhymes about "Catholic frogs" and "Proto dogs". These are only remembered with some amusement by the present generation (from a time long before school aid, by the way). They are not heard today.

There are divisions along social class lines however and it is these which will be debated in the political arena. Government forces will work for regulations to promote a more equal division of the upper social group between the two sectors. They will also argue that non-government aid per pupil should not be based on what government schools spend. Government schools should spend more since they offer broader curricular work with more difficult children and have broader responsibilities to ministry and crown, not just to parents.

In this connection the government school forces are calling for a more accurate breakdown of non-government school costs on an item-by-item

basis. They argue that costs not associated with direct classroom instruction should not be subsidized. Where expenditures are related to school building programs or extra curricular activities they deserve much closer scrutiny.

Finally, some government school leaders also want the state to exercise more control over placement of new schools, approval of courses and staffing levels.

Wages and employment conditions are another contentious issue. Government teachers sometimes resent the fact that their strikes produce wage increases for the non-government sector. Many of the public feel victims of teachers' strikes. Settlement of this issue however will probably await changes in the general system of industrial wage setting - a change that may be some time in coming.

Implications for America

The broad similarities between America and Australia were noted at the very beginning of this study. Specific instances have been noted throughout. With these similarities in mind we can now deal with those questions posed in Chapter I: How is Federal aid to non-government schools going in Australia? What would be likely to happen in America if it adopted some similar plan?

The first point to make here is that Federal non-government school aid is not about to go away in Australia. And it has never been a more popular prospect in America than it is now. General social conditions favour it. The resurgence of organised religion, the work ethic and traditional values help the cause of private schools in both countries. Public and government schools have not been able to capitalise on these recent social movements. The current youth unemployment situation in both countries implies blame for the public school system, however misplaced. For whatever reason private schools do better in placing graduates.

There is some speculation that adverse social conditions make people more self-centred and less conscious of the needs of others. And finally there is the failure of the public school to deliver on each and every one of its earlier promises to society. All these considerations mean that government and public schools are battling in the most adverse societal climates they have ever faced.

Still, if government aid does come to private schools in America the Australian experience suggests that the two sectors must work together at some stage. The public schools, even in their present, politically weakened condition, might well be able to thwart private sector aid attempts if they are disposed to do so. If Australia is any guide, the American public schools must first believe that failure to cooperate with the private sector is costing them Federal funds. Then some mechanism must be established for both sectors to coalesce for political action - eg. the Schools Commission. If one sector cannot get Federal funds without the other both will have incentives to cooperate.

This, of course, leaves aside the matter of the American Constitution, which, under current interpretation, prohibits nearly all forms of aid to religious schools. The single, clearest finding from the Australian experience to date is that any fears of societal divisions along religious lines are misplaced. There are class divisions in both countries, but they are not religiously based. It may well be that some future U.S. Supreme Court will look at the Australian social experience and its High Court decision and make the obvious conclusion.

Opponents of private school aid, on the other hand, would be best advised to look for rationales other than the constitutional ones to bolster their arguments. An entire public school case based on this red herring is not likely to be successful in the long run.

The following points are offered as speculations about what would

happen in America if the Federal Government does begin to aid private schools.

First, the public and private school sectors will have incentives for closer cooperation. Some children, particularly in upper grade levels, may spend part of their day at a public school and part at a private school. There will be some sharing of instructional support personnel. Private school organisation will change. Administration will become more bureaucratised and more systematised. The number of administrators will grow as the Federal Government requires more information.

School efficiency probably won't improve in any objective sense of the term but parents and students will be more satisfied with their schools simply because change will be facilitated in cases where arrangements are unsatisfactory.

Third, there will probably continue to be considerable siphoning off of the upper economic groups into certain schools leaving other schools for the rest. Non-government schools will be more socially segregated than public schools. But based on the Australian experience it is impossible to predict whether the American isolation will increase or decrease from present levels. (Australians have no before/after data of this sort this researcher could find.) The answer probably depends on the precise nature of the private school aid plan adopted in America.

Social distinction will emerge among private schools based on the fees they charge. Low fee schools will have a more overtly religious orientation. High fee schools will be viewed as more social. This distinction applies today in America even without government aid.

Fifth, the bulk of government funds for the private sector probably will go to improve teachers' salaries and reduce class sizes. Private schools fees will not drop sharply if government aid is introduced but neither will they go up as fast as the cost of living.

Sixth, with the introduction of private school aid there will be some shift of children to that sector. But the shift will be gradual, not dramatic enough to confirm public schools' worst fears. Also there will be a boom in religious education. While the proportion of children transferring to the private sector will be small, their numbers will be large. Almost all of these children will have some form of religious instruction.

Last, society will not know the effects of any change until years later. School aid will continue to be a contentious issue.

FOOTNOTES

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6. Harold Noah and Joel Sherman. OECD Financing and Policy Goals for Primary Schools, General Report. Paris: Organisation for Economic Cooperation and Development, 1979.
See also Joel Sherman, Federal Education Policy in Australia: Implications for the United States. Washington: National Institute of Education, 1981.

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18. Helen Praetz, Building A School System: A Sociological Study of Catholic Education. Melbourne: Melbourne University Press, 1980.

19. Don Smart, Federal Aid to Australian Schools. St Lucia: University of Queensland Press, 1978.

20. Peter D. Tannock, The Government Of Education In Australia: The Origins of Federal Policy. Nedlands: University of Western Australia Press, 1975.

21. Report For The Triennium, 1982-1984. Canberra: The Schools Commission, 1981.

22. J.R. Lawry, "The Free Compulsory and Secular Acts Reassessed." Melbourne Studies in Education, 1972. University of Melbourne Press, pp. 211-227.

23. J. Smolicz and J.M. Moody, "Independent Schools As Cultural Systems." Melbourne Studies in Education, Steven Murray-Smith (ed) Melbourne University Press, 1978.

24. Helen McGrath, The Impact of Recent Federal Government Education Policy Shifts: A Study of Perceptions. Canberra: Education Research And Development Committee Report No 12, Australian Government Publishing Service, 1977.

CHAPTER II

25. For quite different American perspectives see Lawrence A. Cremin, A History of Education in the American Culture. New York: Holt, Rinehart Winston 1953.
Michael B. Katz, Class Bureaucracy And Schools: The Illusion of Educational Change in America. New York: Praeger, 1975.

26. See Lawry, op. cit.

27. For example in New South Wales the several Protestant denominations lost 67% of their schools from 1865-1879. Catholic government aid schools dropped only 15% during the same period. And even this loss was countered by the opening of new schools which were unaided but which also escaped government regulations of the day, regulations which were unacceptable to the church.

28. W.S. Simpkins, "The Australian Literature on Educational Administration: Power, Participation And School Management." Journal Of Educational Administration, Occasional Paper No 1. Armidale: Centre for Administrative Studies, University of New England. 34 pages.

29. Roy Nehrt, Private Schools in American Education. Washington, D.C: National Center For Educational Statistics, 1981. p.26.

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30. J.J. Smolicz and J.M. Moody, "Independent Schools ..." op. cit. p.15.

31. Ross Harrold, "Central Intervention In A Non-Centralised System." (unpublished paper) Armidale, N.S.W: Centre for Administrative Studies, University of New England, 1981.
And Thomas H. Jones, "Federal Mandates and the Future of Public Schools" in The Nationalization of State Government. J. Hanus (ed) Lexington, MA: Lexington Books pp. 105-129.

32. This footnote provides a supporting example. Suppose that a school A's per pupil expenditures are 93% of government standard. If school A is independent of a system it falls into Group II for Federal recurrent funding purposes. (See Table 2.4) The system, as a whole, may be spending only at 80% of government standard. It is categorised as Group III. The addition of one relatively high spending school would not change the system-wide classification, yet the school in a sense would have joined Group III. It would be of course up to the system to allocate funds to member schools.

33. 1978-79 Annual Report, Education Department of Victoria. Melbourne: F.D. Atkinson Government Printer, 1980. p.99.

34. Ian W. Hind, "Estimates Of Cost Functions For Primary Schools in Rural Areas." Australian Journal of Agricultural Economics, 21 (i) 1977. pp. 13-25.

35. The difference was significant even after controlling for family size, parental education and father's occupation. See Trevor Williams et. al., School, Work and Career. Hawthorn, Victoria: Australian Council for Educational Research, Monograph No 6, 1978. p. 61.

36. Neil Baumgart, "Survey of Public Opinions About Schools in New South Wales." Australian College of Education, New South Wales Chapter Macquarie University 1979 (data from other states is included). In this connection it is interesting to note that Australians rate schools from whatever sector higher than Americans rate their public schools in the annual Gallup Polls published in Phi Delta Kappa Magazine. The phrasing of the question in the two countries is almost identical.

37. The conversation with Ray Costello of the Australian Teachers' Federation was lengthy but it was not tape recorded. His statements and supporting documents were particularly to formulation of my thinking on these subjects. For more information see "Submission To The Minister For Education Concerning The Schools' Commission's Report For The 1982-84 Triennium." Canberra: Australian Teachers' Federation, 1981.

38. For further information see C. Blakers, The Commonwealth Role in School Education. Melbourne: Australian Council of State School Organisations, 1978.

39. Religion in Education in New South Wales Government Schools. A Report of the Committee Appointed By The Minister of Education To Consider Religious Education. Sydney: Ministry of Education, 1980.

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40. The Christian Community Schools Movement. Canberra; Commonwealth Schools Commission, (unpublished paper) 1981.

41. John Higley, Desley Deacon and Don Smart, Elites in Australia. London: Routledge and K. Paul, 1979. This research identified large core elite groups rather than a pluralistic power structure. It also contains excellent summaries of related literature.

APPENDIX

HIGH COURT OF AUSTRALIA

BARWICK C.J.
GIBBS, STEPHEN, MASON, MURPHY, AICKIN and WILSON JJ.

HER MAJESTY'S ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (AT THE RELATION OF BLACK AND OTHERS) AND OTHERS	APPELLANT
AND	
COMMONWEALTH OF AUSTRALIA AND OTHERS	RESPONDENTS

10 February, 1981

Solicitors for the Appellant: *J.N. Zigouras & Co.*
Solicitor for the first, second, third and fourth Respondents: *B.J. O'Donovan, Crown Solicitor for the Commonwealth*
Solicitors for the fifth and sixth Respondents: *Corr & Corr*

BARWICK C.J. The Attorney-General of the State of Victoria on the relation of a number of Australian citizens interested in various capacities in the education of children in Australian States and in federal Territories sues the Government of the Commonwealth and certain of its Ministers for declarations of constitutional invalidity of several statutes enacted by the Commonwealth Parliament. The defendants assert the validity of the impugned statutes. States of the Commonwealth other than Victoria have intervened to support the legislation.

The claimed ground of invalidity is infraction of s. 116 of the Constitution of the Commonwealth, in so far as that section forbids the passage of a law for establishing any religion. It may be as well to set out immediately the full text of the constitutional provision:

> "116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The statutes which are said to infringe the terms of the section are Appropriation Acts in so far as they appropriate consolidated revenue to fund the implementation of various statutes granting money to the States of the Commonwealth and the granting statutes themselves. These statutes, so far as they are attacked by the plaintiffs, provide for grants to the States on condition that the money so granted is paid by the States to non-government schools to finance their educational programmes, including the erection of buildings therefor. Some of the intended recipients are schools owned and run by religious bodies, as it happens, in large part by the Roman Catholic church or its agencies.

A great deal of evidence was given as to the extent of the financial support thus provided from Commonwealth funds and as to the manner in which the non-government schools owned and run by religious bodies were conducted. As well, much statistical material, largely in the public domain, was aggregated. Having regard to the opinion I have formed and which I shall shortly express, I have no need to discuss this body of evidentiary material or to attempt to resolve such conflicts as it contains. In my view, it is in truth for the most part irrelevant to the resolution of the question whether the nominated statutes, individually, collectively or in any combination, are or contain a law for establishing a religion.

In the course of the argument of the case, a considerable number of points have been raised. But in the long run, in my view, few of them need to be resolved. Later in the course of expressing myself I shall mention the more substantial of them. But I proceed immediately to the central question for decision.

Section 116 in terms applies to all laws, in my opinion, without exception. The Parliament "shall not make *any* law for establishing any religion". I can find no acceptable reason for excluding from this universality an Appropriation Act or an Act granting money to a State pursuant to s. 96. Whilst there may no doubt be difficulty in forming the conclusion that any such Act is a law for such establishment the possibility cannot be denied. Nor is there, in my opinion, anything in the nature of an Appropriation Act or an Act granting financial assistance which necessarily precludes the application of the description "a law for establishing any religion".

I should add, perhaps unnecessarily, that each operative provision of a statute is itself a law: and there is no difficulty in applying that concept to the items of an appropriation, or a granting, statute.

When it is necessary to determine what a statute does or what purpose it affects to achieve, its meaning and operation must be considered in the light of the state of the law then existing; that is to say, the concurrence of the existing statutory law may bring an enactment into collision with such a provision as s. 116 whilst that statute if passed in a void might not offend. It is for that reason that it has been necessary in this case to consider the impugned statutes not merely in isolation but in combination; and, as I have said, to do so, if need be, item by item, or section by section. I might mention, however, that no other existing statutory provision, either of the Commonwealth or of the States, appears to be relied upon to convert what would not otherwise infringe into an offending statute.

Further, validity will need to be considered against the background of relevant aspects of the current situation of the community at the date of the passage of the statute. But, for my own part, nothing in that current scene is critical to validity in this case.

It was submitted for the Commonwealth that s. 116, not being a provision granting legislative power but, on the contrary, a provision denying it, ought not to be read as largely as a facultative provision should be read. This submission was based on the view expressed by Sir Owen Dixon in *Wragg v. The State of New South Wales*, 88 C.L.R. 353. With the greatest respect to an opinion of Sir Owen, I am unable to accept this submission. I can find no reason why the words of the Constitution should not be given their full effect, whether they be expressed in a facultative or prohibitory provision. In particular, in this case, the emphatic universality of the language of s. 116 seems to me to brook no restraint sought to be imposed by any such doctrine as the submission propounds. The control of the legislature by the Constitution is of the essence of its text.

An attempt was also made in argument to develop some restriction on the language of s. 116 from the position it occupies in the Constitution being included as it is in Chapter V which bears the heading "The States". But, in my opinion, the language of the section is not in the slightest affected by the position in which the section is placed in the text of the Constitution: nor can its meaning be determined thereby. To suggest that, because of that placement, it should be read as in any sense a direction to the States is to deny effect to simple and direct English. The section plainly says "The Commonwealth shall not" and its final words deal only with any office or public trust under the Commonwealth.

Before turning to the interpretation of the language of s. 116, having regard to the various submissions made as to its meaning, I wish to say something as to the use in that connection of material extraneous to the text itself. First, as to the use of the convention debates: the settled doctrine of the Court is that they are not available in the construction of the Constitution: and, in my opinion, rightly so. An academic exercise to explain historically why the Constitution was cast in a particular form is one thing. To identify the meaning of the words in which the Constitution is expressed by examination of its discursive development is quite another. The former, in my opinion, has no place in the task of construing the text of the Constitution except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved. But, absent the possibility which such ambiguity may present, the task of educing the meaning of the words constitutionally employed derives, in my opinion, no assistance from a consideration of the process by which that text came into being. Indeed, attention to the course of the convention debates might well distract the mind from the proper meaning of unambiguous words in the text.

That is not to say, however, that that meaning must be assigned without regard to the sense in which the words of the text were understood in the day of their expression. As I have said elsewhere, the then current meaning of the words used in the text is the meaning, the connotation, they must thereafter bear, though in application in later times they may achieve results not within the contemplation of those who wrote the text. In other words, the denotation of the words may expand whilst their connotation remains fixed.

Secondly, the use of historical material generally is, in my opinion, subject to the same observations and limitations.

Thirdly, there is the resort to the text of the American Constitution, and in this instance to the text of the Bill of Rights, and to the decisions of the American courts, particularly those of the Supreme Court in construing these texts. The plaintiffs have placed considerable emphasis on this material: indeed, it has formed a major element in their submissions.

Again, the text of our own Constitution is always controlling. Even similar or identical language in the American instrument to that in our Constitution can, in my view, rarely, if ever, be controlling. But divergencies in the respective texts must inevitably weaken, if indeed they do not destroy, any support which might be sought to be derived from the American text or its construction. In the case of ambiguous language in our own text, language reasonably capable of bearing more than one meaning, a consideration of the American text and of its judicial interpretation, particularly that which preceded the expression of the Australian text, may assist to determine which of those meanings the language of our text should bear. But, in this case, in my opinion, there is no ambiguity in the relevant text.

Further, in the instant case, not merely is there difference between the Australian text and the language of the relevant provisions of the Bill of Rights, but that language had received an interpretation before the adoption of our Constitution. It later had further and at times different interpretation. The adoption of such diverging language thus has a more than usual significance. It can scarce be said with reason that the use of different, and as I think radically different, language in our Constitution, indicated an intention thereby to achieve what the American courts had decided to be the result of the American text. I am not called upon here to discuss these judicial pronouncements. It suffices to say that, for myself, I would not necessarily agree with them; indeed, in some respects I could not accept them. But, more importantly, the very divergence in the language of our text from the corresponding terms of the Bill of Rights, assuming those decisions rightly assigned meaning to them as at the time of our federation, makes it in my view more than unsatisfactory to attempt to apply to our text the meaning and operation given to the relevant portion of the Bill of Rights.

I find the language of s. 116 in the relevant part quite unambiguous and have no need to attempt to give it meaning by analogy of, or by derivation from, that of the Bill of Rights or from the interpretations it had received. Consequently, I have no need to dwell on the radical difference in the nature of the Bill of Rights as a whole and that of our Constitution and of s. 116 in particular and the consequences that difference in nature may have on any attempt to use the language and circumstances of the one as an aid to the construction of the other.

The divergence in language to which I have earlier referred is apparent from the use of the word "respecting" in the American text and the word "for" in s. 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the purposive nature of the Australian expression and the lack of such an element in the American text.

However, in the interpretation and application of s. 116, the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is "*for* establishing any religion", the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.

The inhibition of s. 116 is directed to the making of any laws for establishing any religion. Although, in my opinion, not critical in the instant case, the word "religion" in s. 116 is not really satisfied by a sect or department of the one religion. Hence, the Christian faith, though practised according to particular doctrines by different churches, is in truth one religion. Islam provides another, and so on. I gravely doubt whether it is correct to regard the different Christian churches as separate and distinct religions for the purposes of s. 116.

It may well be possible to conclude from this circumstance that the section is not in any wise directed against discrimination of one church in relation to others. But I find no need in this case to seek support for my own opinion by any such construction of s. 116. Maybe what I am about to say further explains why I do not here pursue the possibility.

The establishment of any one of the Christian churches would, in my opinion, amount relevantly to the establishment of the Christian religion and a law to establish that church would be a law for establishing a regligion. Thus, in practical terms, there is really no need finally to decide in this case whether the expression "any religion" in s. 116 is equivalent to any church or section of a religion. Whatever the conclusion in this connection, the Commonwealth may not make any law for establishing one of the Christian churches because that, in my opinion, would be to establish the Christian religion within the meaning and operation of s. 116.

The operative words of s. 116 are addressed to the Commonwealth and inhibit the making of laws by the Commonwealth. That means they are directed to the Parliament. Included in the laws the making of which the section proscribes are laws which authorise the making of subsidiary laws in the form of proclamations, statutory rules or by-laws. The prohibition will include such subsidiary legislation which is within the authority of an Act of the Parliament but which in itself offends the terms of the section. It may be, of course, that in authorising subsidiary legislation which could offend the constitutional provision, the authorising statute may itself offend. But room must be left for the rare occasion when this result does not necess-

arily follow. If, of course, the subsidiary legislation is outside or beyond the scope of the statutory authority, it will be invalid for that reason though it might also, if it were valid, in its terms transgress the inhibition of the section.

Here, we are only concerned with the activity of the Parliament itself, with statutes passed by the Parliament, with laws made by it.

The next observation I wish to make as to s. 116 is that it is directed to the *making* of law. It is not dealing with the administration of a law. But, if that administration is within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s. 116. That is so, not because of the manner of the administration but because the statute, properly construed, authorises it. I say most probably, because the purposive content of the expression "for establishing" must, in any case, be satisfied.

The time at which to determine vis à vis s. 116 the validity of a law is therefore the time of its making, of its passage by the Parliament. As I have said, it will be tested against the situation of law and fact current at the time of its enactment. It must then be judged for what in that situation it does and what upon its reasonable construction it authorises. The manner of its administration can have no independent effect. What may lawfully be done in its administration forms part of the consideration of the validity of its enactment: and what can be lawfully done is determined by the construction of the statute, the determination of its meaning and its operation.

These considerations emphasise the dominant importance of the terms of the statute itself when a question as to the application of s. 116 arises. It is the making of the law which is proscribed. Consequently, the construction of the statute and the determination of its operational effect will be the determinant. Thus, in my opinion, the question in this case could have been decided on demurrer, even if a cautious defendant wished to plead as well as demur.

I have now to deal with the meaning of the operative words of s. 116 before applying them to the statute under challenge in this case.

As I have already indicated, I find no ambiguity in the language of s. 116. The meaning which "establishing" in relation to a religion bore in 1900 may need examination. But that is not because of ambiguity but to ensure that the then current meaning is adopted. However, whilst I have considered what was the current significance of "establishing any religion" in 1900, I am of opinion that there has been no real change in the significance of the words over the years which have intervened. Doubtless, because of our colonial origins and our remoteness from England, the reality of an established religion

has not often been borne in upon the public of this country. Further, even in England, the ramifications or consequences of the existence of an established church have become both less and less apparent. But what would be involved in establishing a religion has, in my opinion, remained constant. In my opinion, as used in an instrument brought into existence at the turn of the century, establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronise, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth "establishment". One can perceive these concepts in the decision of the House of Lords in *General Assembly of Free Church of Scotland v. Lord Overtoun*, 1904 A.C. 515. I feel no doubt that this is the sense in which the relevant part of the language of s. 116 was used when our Constitution was formed. As I have indicated, I think the words would mean the same if constitutionally used today. Thus what s. 116 forbids is the passage of a law which will erect a religion into such a relationship to the body politic of the Commonwealth as I have attempted to describe.

It is apparent to my mind that, if for no other reason, the inclusion in s. 116 of the prohibition of any law imposing any religious observance or for prohibiting the free exercise of any religion and the proscription of any religious test indicate clearly enough the precise limits of the total inhibition of the section. The absence of any prohibition upon the giving of aid to or encouragement of religion from the entire collocation of s. 116 is eloquent. No imposed observance: free exercise of religion: no religious test. No established religion. Otherwise the powers with respect to subject matter and in the nomination of the conditions of a grant to States is plenary and without limitation except in so far as the description of the subject matter may import limitation.

Here, the impugned legislation in substance appropriates, and authorises the disbursement of, part of the consolidated revenue of the Commonwealth for the financial support of the education of Australians by and according to the regimen of non-government schools, including such schools as are owned and conducted by bodies professing and practising the Christian religion, albeit according to the doctrines of a particular church. The financial aid is expressly limited to the educational activities of such schools.

Let it be supposed for the purposes of this discussion, though it must not be thought that by the assumption I am expressing a concluded view in that sense on my own behalf, that opportunity is taken by those in control of such educational activities to utilise some part of the time set aside for such

educational activities to foster the practice of the Christian religion, albeit according to the practices or doctrines of a particular church, and let it be supposed that buildings to the cost of the construction of which money derived from the legislation has been applied, are on occasions used for some religious activity of the owner of the premises: I do not think the material proffered on behalf of the Attorney-General of Victoria or the relators on whose behalf he sues takes the matter any further than the assumptions I have just described.

Can it be said that, therefore, the law made by the Parliament is a law for the establishment of a religion in the sense which I am prepared to give to those words, and thus in breach of the inhibition imposed on the Parliament by the Constitution? Nothing in the laws made by the Parliament expressly authorises the use of Commonwealth funds for those purposes, though it might justly be said that no provision of that law expressly or adequately prohibits the schools or those conducting them from using the occasion or the buildings assisted or built with money provided for support of educational activities to so use the occasion or the buildings. I cannot think that it can rationally be said that by not preventing such a use of the occasion or buildings which I have assumed, the law providing the funds for the forwarding of the education of Australians by non-government schools is a law for establishing a Christian religion. A law which in operation may indirectly enable a church to further the practice of religion is a long way away from a law to establish religion as that language properly understood would require it to be if the law were to be in breach of s. 116. It would not be enough that the law allowed such activity on the part of the owners of the schools. The law must be a law *for* it, i.e. intended and designed to set up the religion as an institution of the Commonwealth.

It might be that the same result might well follow even if it be right and proper to treat the situation I have assumed as authorised by the legislation under attack. But I have no need to decide the question for I have been unable to find any statutory authorisation by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities. That there is no statutory prohibition of such religious activities in the course of authorised educational activities is scarce enough to make the appropriation and granting statutes, laws for establishing a religion in the only sense, in my opinion, those words can have in the Constitution. What the Constitution prohibits is the making of a law *for* establishing a religion. This, it seems to me, does not involve a prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion. It is the establishment of such a religion which may not be effected by a law of the Commonwealth designed to do so. I have already, though perhaps only incidentally, indicated that the text of s. 116 refers to legislation which is designed to establish a religion, which intends and seeks that end, which is in that sense purposive in nature. I have concluded, therefore, that, even on

the assumptions I have made, the challenge to the validity of the Acts here challenged should fail.

A separate attack was made on the granting statutes. It was said that, because of the detailed nature of the conditions attached to the grant, the granted State became a mere conduit pipe to transmit the granted amount of money from the Commonwealth to the designated recipients for purposes in respect of which the Commonwealth has no legislative power. From this, it was said, the conclusion follows that these grants were not grants of financial assistance to the States.

The submission gains no support from the decisions of this Court. In fact, the Court has earlier decided that grants on like detailed conditions relating to matters over which the Commonwealth lacks legislative power are validly made under s. 96 and that the conditions are enforceable according to their terms. Perhaps the extreme case was seen in the Uniform Tax legislation in which the condition of the grant was the abstention by the recipient State from exercise of its own legislative power.

But, in any case, in my opinion, the submission is not acceptable. The conditions of the grant in this case relate to a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State. The operation of the conditions depends on the State's acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice. Again, I should think the Uniform Tax conditions were a dramatic illustration of economic necessity. But the granting legislation had the support of this Court. The State's acceptance must involve the conclusion that the provision of funds to the recipients indicated by the conditions of the grant was, at least in general, in line with State policy. I say "in general", because it may be that whilst the State would favour expenditure, e.g. on non-government schools, if it were sufficiently in funds without Commonwealth assistance, it might choose to distribute its funds in some different manner and perhaps with different safeguards, though broadly with the same objective. In such circumstances, it cannot, in my opinion, be said with reason that the funds granted by the Commonwealth are of no assistance financially to the States. Further, however much a State might prefer to pursue the objective of better educational facilities for the dwellers in that State, it cannot be denied, in my opinion, that the receipt and expenditure of the grant lessens the demands on the Treasury of the State. The submission of the plaintiffs in this respect is, in my opinion, unacceptable.

I have now read the reasons for judgment prepared by my brother Wilson. The detail of the impugned statutes and of the statistical material aggregated in the course of the case is there set out.

I agree with the conclusions to which my brother has come and which he expresses in his reasons for judgment. I agree substantially with the reasons he gives for arriving at those conclusions. Any divergencies can be seen in the reasons I have myself expressed for concluding that the claims of the Attorney-General for the State of Victoria are insupportable and that his action should be dismissed. The statutes attacked in the action are valid laws of the Commonwealth and not in any wise in breach of s. 116.

GIBBS J. This action is brought to challenge the validity of a number of Acts of the Commonwealth Parliament under which financial assistance is provided to schools in the States and in the internal Territories of the Commonwealth. The legislation is challenged in so far as it results in benefits being provided to schools which are not conducted by or on behalf of the government of a State or of the Commonwealth ("non-government schools"), particularly such schools as are conducted by or on behalf of, or are associated with, religious bodies ("church schools"), although if one ground on which the attack is made proves successful it will also invalidate the legislation in its application to government schools. The Acts under which financial assistance is or has been provided to schools in the States are the various *State Grants (Schools) Acts* and *State Grants (Schools Assistance) Acts* passed in and between the years 1972 to 1979 (there are eleven such Acts) and the plaintiffs claim that those Acts are beyond the powers of the Commonwealth Parliament and invalid. The plaintiffs also assert the invalidity of the *Schools Commission Act* 1973 which constitutes a Commission whose functions include advising the Minister on matters which in fact are relevant to the exercise of his discretion under the Acts. Payments to or for the benefit of schools in the Australian Capital Territory and the Northern Territory have been made under the authority of general *Appropriation Acts*, and certain loans to school authorities in those Territories have been guaranteed by the Treasurer on behalf of the Commonwealth under the *Independent Schools (Loans Guarantee) Act* 1969, and the plaintiffs claim that the *Appropriation Acts* to the extent to which they appropriate moneys to be spent on church schools in the Territories, and the *Independent Schools (Loans Guarantee) Act* 1969, are also invalid.

The first plaintiff, the Attorney-General for the State of Victoria, sues on the relation of a number of persons, some of whom also sue individually. The remaining fourteen plaintiffs are persons who reside either in Victoria, New South Wales, Tasmania or the Australian Capital Territory and who pay taxes to the Commonwealth. Some of those plaintiffs are the parents of children who attend government schools. The defendants are the Commonwealth, three Ministers of State of the Commonwealth, and two representatives of non-government schools.

After evidence had been taken before Murphy J., the case was referred to the Full Court for argument. I intend no disrespect to the very thorough and careful case presented by the plaintiffs when I say that it will be sufficient for the purposes of this judgment if I state only in the barest outline the facts in the light of which the validity of the legislation has to be considered, and the nature of the legislation itself. Throughout Australia primary and secondary education is compulsory for all children below a specified age. Pupils may receive that education either at government schools or at non-government schools. Most of the non-government schools are church schools, and of those most are Roman Catholic schools. The non-government schools, whether or not they are church schools, impart education in ordinary secular subjects, generally speaking in accordance with the same curriculum as that adopted in government schools, and to an academic standard comparable with that in government schools, and under a system of supervision provided by State law. Some of the non-government schools provide a very high standard of education. Of course, most church schools give religious as well as secular instruction and, at least in the case of schools conducted by some religious denominations, are intended to serve the purpose of inculcating in their pupils the religious beliefs and values of the church concerned. It may be accepted that in some cases, if not in most, church schools are seen by the church as fulfilling a religious as well as a purely educational purpose: their functioning is regarded as an integral part of the religion which supports the schools.

Non-government schools derive income from fees and other private sources, and receive financial assistance from the States as well as that which the Commonwealth provides under the statutes whose validity is now in question. The statutes passed from time to time vary in detail, but it is sufficient to take the *States Grants (Schools Assistance) Act* 1979 as an example. That Act provides that "financial assistance is granted to a State" in respect of expenditure in relation to government and non-government schools in the State. In the case of non-government schools, the expenditure may be in respect of an approved building project or equipment project (s.16). Such a project shall not be approved by the Minister if the sole or principal object, or one of the principal objects, of the project is to provide facilities for use, wholly or principally, for or in relation to religious worship: s.15(2). The financial assistance provided may also be in respect of recurrent expenditure, whether of an approved school system (s.18) or of a non-systemic school (s.19) or in connection with migrant education (ss.21 and 22) or disadvantaged schools (ss.24 and 25) or special schools (s.27). The amount payable in each case depends on the discretion of the Minister, subject to specified statutory limits. No express restriction on expenditure for religious purposes, similar to that contained in s.15(2), appears in these sections. Each of the sections under which these grants may be made imposes conditions on the grant. These conditions oblige the State to pay to the approved authority of the school or school system as the case may be an amount equal to that paid to the State in relation to the project, school or

school system. A further condition is that the State shall not make a payment unless the approved authority has agreed with the State to ensure that the money is applied for the purpose for which it was approved, and that if it does not fulfil any condition it will, if the Minister so determines, repay to the State such amount (not greater than that paid) as the Minister determines. By s.29 further conditions are imposed on the State – (a) to pay to the Commonwealth any amount repaid by or recovered from an approved authority under the conditions of the agreement and (b) to repay to the Commonwealth such amount (not greater than that paid to it) as the Minister determines if the State does not fulfil any of its conditions. The condition requiring an agreement of the kind mentioned above to be made between the approved authority and the State was first introduced by the Act of 1977; before that time, the relevant condition was that the State should make a repayment to the Commonwealth if the school authority did not fulfil the conditions of the grant.

The argument on behalf of the plaintiffs is that this legislation is invalid for two reasons – first, because it is not authorized by s.96 of the Constitution – the section under which the Commonwealth claims that the legislation may be supported – and secondly because the Acts are laws "for establishing any religion" and therefore infringe s.116 of the Constitution. The laws which provide financial assistance for church schools in the Territories are said to be invalid only on the second of these grounds.

At the outset there arises the question whether the plaintiffs or any of them have standing to bring this action. In my opinion it is clear that the Attorney-General for Victoria has a locus standi to sue for declarations of the invalidity of the Acts in question in so far as they apply to schools in Victoria. Indeed in *Victoria v. The Commonwealth* (the *Roads Case*) (1926) 38 C.L.R. 399 proceedings were brought by two States and their Attorneys-General to challenge the validity of an Act on the ground that it was not a proper exercise of the power conferred by s.96, and the Court said, at p.407, that the action was properly constituted. In *Attorney-General (Vict.) v. The Commonwealth* (the *Clothing Factory Case*) (1935) 52 C.L.R. 533, at p.556, Gavan Duffy C.J., Evatt and McTiernan JJ. said:

> "In our opinion, it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents."

In *Attorney-General (Vict.) v. The Commonwealth* (the *Pharmaceutical Benefits Case*) (1945) 71 C.L.R. 237, at p.272, Dixon J. said that this statement expressed the settled doctrine of the Court, and himself restated the principle by saying that the Attorney-General of a State has "a *locus standi* to sue for a

declaration wherever his public is or may be affected by what he says is an *ultra vires* act on the part of the Commonwealth or of another State". Those statements of principle would I think be applicable in the present case, where the Acts operate on the State of Victoria itself, and on schools within the State. It does not seem to me material that the State of Victoria has accepted the grants of financial assistance made under the Acts. The State is perfectly entitled to say that it will accept the financial assistance if the Acts are valid and the conditions are binding, but that it nevertheless wishes to challenge the validity of the Acts and the conditions. The Commonwealth however says that the *Appropriation Acts* under which moneys are paid for the assistance of schools in the Territories, and the *Independent Schools (Loans Guarantee) Act* 1969 under which guarantees are given to enable such schools to borrow money, have no operation in Victoria, and that the Attorney-General for Victoria has no standing to challenge their validity. With all respect I cannot agree. I remain of the opinion which I expressed in *Victoria v. The Commonwealth and Hayden* (the *A.A.P. Case*) (1975) 134 C.L.R. 338, at p.381, which was the case of a challenge to an *Appropriation Act*, that "it is involved in the very nature of the Constitution that either the Commonwealth or a State should have standing to institute legal proceedings when the other has exceeded its constitutional authority." Mason J. expressed a similar view in the same case at pp.401-2, but Stephen J. disagreed (see at pp.387-390) and Murphy J. was inclined to agree with him, although he said that if it were claimed that the appropriation or expenditure were in breach of any constitutional prohibition then the position might be different (see at pp.424-5). In my opinion even where no question arises as to the limits inter se of the powers of the Commonwealth and the State, the Attorney-General of a State may sue to compel the Commonwealth to observe the fundamental law of the Constitution, which the citizens of any State have an interest to maintain, although it may not be such a special interest as would enable them as individuals to bring the suit. On the other hand, as at present advised, I gravely doubt whether the other plaintiffs have standing to sue; I hardly think that the fact that they are taxpayers, and in some cases parents of children at government schools, gives them a special interest in the subject matter of the action within the principles stated in the cases collected in *Australian Conservation Foundation Inc. v. The Commonwealth* (1980) 28 A.L.R. 257, at pp.267-8. However in Canada an exception to the general principle appears to have been recognized in constitutional cases (*Thorson v. Attorney-General of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1) and since, for reasons which will appear, it is unnecessary to decide whether these individual plaintiffs have standing, I would express no concluded opinion on the question.

I turn then to consider whether the Acts in question were Acts by which the Parliament granted financial assistance to the States within s.96 of the Constitution. That section provides as follows:

> "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

The argument on behalf of the plaintiffs was that the Acts gave financial assistance not to the States but to the schools, or, in the case of capital grants, to the owners of the property on which the schools were conducted. The moneys granted did not enure for the benefit of the State Treasuries, but were given to the States to be passed on immediately to the schools. The States played no part in deciding what schools got the money, how much was to go to each recipient or how the moneys should be spent, and were, it was said, no more than passive instruments by which the Commonwealth transmitted its moneys to the persons whom it had decided to assist.

The submission that a grant made in these circumstances is not authorized by s.96 cannot be upheld without overruling the decision of this Court in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735, which was affirmed by the Judicial Committee: 63 C.L.R. 338. In that case it had been agreed by the Commonwealth and all the States that it was necessary to take action to stabilize the price of wheat, and for this purpose the Commonwealth Parliament imposed an excise duty on flour, and thus obtained funds out of which moneys could be paid to assist wheat growers. However, since Tasmania alone among the States produced very little wheat, so that only a very small part of the money raised in Tasmania by the excise would be returned to wheat growers in that State, it was decided to make a special provision in relation to Tasmania. It was not possible to except Tasmanian consumers from the excise, for that would have been contrary to s.51(ii) of the Constitution. Acts were passed which provided that the proceeds of the excise should go into a fund which was to be applied in making payments to the States in proportion to the quantity of wheat produced, and that these grants should be paid to each State upon condition that the money received should be distributed to the wheat growers in that State in proportion to the amount of wheat sold or delivered for sale by each wheat grower in the relative year. Provision was made for an extra grant to Tasmania which it was intended should be distributed among the persons in that State who had paid the excise. It was held that the grants to the States on the conditions stated were validly made under s.96. The effect of this decision was stated by Dixon C.J. in *The State of Victoria v. The Commonwealth* (the *Second Uniform Tax Case*) (1957) 99 C.L.R. 575, at pp.606-7 as follows:

> "Now it might have been thought that these provisions were outside s.96 because they gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among the wheat growers of the State .... In fact, however, the provision was considered to amount to financial assistance to the State notwithstanding that the State was bound to distribute the money it received to the wheat grower.

> The decision, which was affirmed in the Privy Council, without express reference to this use of s.96, must mean that s.96 is satisfied if the money is placed in the hands of the State notwithstanding that in the exercise of the power to impose terms and conditions the State is required to pay over the money to a class of persons in or connected with the State in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly. I should myself find it difficult to accept this doctrine in full and carry it into logical effect, but the decision shows that the Court placed no limitation upon the terms or conditions it was competent to the Commonwealth to impose under s.96 and regarded the conception of assistance to a State as going beyond and outside subventions to or the actual supplementing of the financial resources of the Treasury of a State."

None of the parties in the present case asked us to overrule *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.*, but the plaintiffs sought to distinguish that case on the ground that the legislation there in question was promoted by the States, and on the further ground that the conditions of the grants left it to the States to select the individual persons to whom the moneys were to be distributed and the amount payable to each. The fact that the States combined to give effect to the scheme shows that they were prepared to accept the conditions of the grants, but that fact has no bearing on the question whether, in the circumstances mentioned, it was right to say that there was a grant of financial assistance to a State, or whether the conditions of the grant were valid. Further, the circumstance that a State was called upon to apply the formula laid down in the condition of the grant does not alter the fact that the State received the money only on condition that it be paid out in the manner indicated by the Commonwealth. I find it impossible to distinguish *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* from the present case. That case decides that if money is granted by the Commonwealth to a State, there is a grant of financial assistance to the State within s.96 notwithstanding that the condition of the grant requires the State to pay all the moneys away. The State cannot be compelled to accept the moneys, and the fact that it does accept them may be regarded as an acknowledgement of the fact that the moneys granted are of assistance to the State.

The question that next arises is whether the Commonwealth can, by a condition of a grant made under s.96, evade the prohibition contained in s.116 of the Constitution. That section is in the following terms:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The question is whether if the conditions of a grant of financial assistance require the State to which the grant is made to establish a religion within the meaning of that section, the Act by which the grant is authorized is invalid as contrary to s.116. It is plain, as *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* shows, that a condition may be imposed under s.96 for the purpose of persuading a State to do something which the Commonwealth itself could not do. *Pye v. Renshaw* (1951) 84 C.L.R. 58 provides another example. The cases show that the Parliament has wide power to fix the terms and conditions of a grant made under s.96. In *Victoria v. The Commonwealth* (the *Roads Case*), at p.406, it was said that the *Federal Aid Roads Act* 1926 was "plainly warranted by the provisions of sec.96 of the Constitution, and not affected by those of sec.99 or any other provision of the Constitution", and the statement that grants made under s.96 are not affected by any other provision of the Constitution was repeated in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.*, at pp.763,771. On the other hand, in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, at p.123, Latham C.J. said that s.116 "prevails over and limits all provisions [of the Constitution] which give power to make laws", and McTiernan J. said, at p.156, that the section "imposes a restriction on all the legislative powers of Parliament." I consider that the ordinary rules of statutory construction should be applied, and that ss.96 and 116 should be read together, the result being that the Commonwealth has power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit, provided that a law passed for that purpose does not contravene s.116. It is one thing to say that the Parliament, by a condition imposed under s.96, could achieve a result which it lacks power to bring about by direct legislation, but quite another to say that the Parliament can frame a condition for the purpose of evading an express prohibition contained in the Constitution. As the Judicial Committee pointed out in *W.R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.)*, at pp.346-7, the powers given by s.51 of the Constitution are expressly made "subject to this Constitution" which includes s.96. On the other hand, s.116 is not expressed to be subject to the Constitution. Of course the same is true of s.99, but that section speaks of "any law or regulation of trade, commerce or revenue" and a law under s.96 cannot properly be regarded as such a law: see *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.*, at p.775. However, whether or not the provisions of s.51 can be "completely disregarded" in deciding upon the validity of a law made under s.96 (as to which see *W.R. Moran Pty. Ltd. v. Deputy Federal Commissioner of Taxation (N.S.W.)* at pp.349-350), I consider that the Parliament, acting under s.96, cannot pass a law which conflicts with s.116. To take an unlikely example, an Act which granted money to a State on condition that the State would prohibit entirely the exercise of a particular religion would, in my opinion, be a law for prohibiting the free exercise of that religion, and would be invalid.

It remains a question whether s.116 applies to laws made under s.122 for the government of any Territory. This question is relevant to the validity of the *Independent Schools (Loans Guarantee) Act* 1969. There are strong dicta, in addition to those in the *Jehovah's Witnesses Case* which I have already cited, which support the view that s.116 does apply to such laws: *Lamshed v. Lake* (1958) 99 C.L.R. 132, at p.143; *Teori Tau v. The Commonwealth* (1969) 119 C.L.R. 564, at p.570, but those dicta are in my opinion very difficult to reconcile with the decision in *R. v. Bernasconi* (1915) 19 C.L.R. 629, where it was held that the power given by s.122 is not restricted by s.80 of the Constitution – see also *Spratt v. Hermes* (1965) 114 C.L.R. 226, at p.250. If s.122 is limited by s.116, the latter section will have a much larger operation in the Territories than in the States, for although s.116 is contained in Chapter V of the Constitution which is headed "The States" it is not expressed to bind the States. However, for the reasons already given, it is in any case necessary to consider the effect of s.116 in the present case, and in view of the conclusion which I have reached on that question I need not finally decide whether the section is applicable to laws made under s.122.

I then come to what is the most important question in the case, whether any of the laws now challenged is a law "for establishing any religion" within the meaning of s.116. The primary argument submitted for the plaintiffs is that the relevant words of s.116 – "the establishment clause" – prohibit the Commonwealth from making any law which provides any recognition, aid or support (financial or otherwise) to one or more religions or to religion generally, and that the legislation in question provides financial assistance to the religions which conduct, or are closely associated with, the schools that receive the moneys. Alternatively it was submitted that s.116 should be construed as prohibiting the giving of recognition, aid or support to one or more religions in preference to other religions, and that the legislation is invalid within that test, because it does not prohibit the Minister from giving preference to some non-government schools over others on account of their religious affiliation, and because in the nature of things some religions must benefit more than others from the assistance provided under the Acts, because more schools are conducted by, or associated with, some denominations than by others. A further alternative submission was that the legislation, and in particular the *Schools Commission Act* 1973, requires the Commonwealth to be excessively involved in religion and that that is a contravention of s.116.

Whether any of these arguments can succeed depends in the first place on the proper meaning of the expression "establishing any religion" in s.116. "Establish" has in its ordinary sense a variety of meanings. According to the Oxford English Dictionary those meanings include: "2. To fix, settle, institute or ordain permanently, by enactment or agreement . . ."; "3. To set up on a secure or permanent basis; to found . . ."; "4. To place in a secure or permanent position; to install and secure in a possession, office, dignity, etc; to 'set up'

. . . in business."; and "5. To set up or bring about permanently (a state of things) . . . . . Also, to secure for oneself, gain permanently (a reputation, a position)." However the meaning which is most apposite when used in relation to religion is described by the Oxford English Dictionary as follows:

> "7. From 16th c. often used with reference to ecclesiastical ceremonies or organization, and to the recognized national church or its religion: in early use chiefly *pass.* in sense 2 (esp. in phrase *by law established*, i.e. 'prescribed or settled by law'), but sometimes with mixture of senses 3-5. Hence in recent use: To place (a church or a religious body) in the position of a national or state church."

The word "established" is defined in Halsbury (4th edition) vol. 14, par. 334 as follows:

> "The word 'established' in relation to a church is used in various senses. In one sense every religious body recognised by the law, and protected in the ownership of its property and other rights may be said to be by law established. In another sense the words 'established church' are used to mean the church as by law established in any country as the public or state-recognised form of religion. The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given to it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions. What is called the 'establishment' principle in relation to the church is the principle that there is a duty on the civil power to give support and assistance to the church, though not necessarily by a way of endowment, and where this principle prevails a church is said to be established when it receives such support and assistance. In the fullest sense a church is said to be established when all the provisions constituting the church's system or organisation receive the sanction of a law which establishes that system throughout the state and excludes any other system. The Church of England is established by law in England."

It seems to me that the word "establish", when used in relation to religion, has four possible meanings. The widest of these meanings is simply to protect by law. The word was used in that sense by Lord Mansfield in *Evans v. The Chamberlain of London* "when, speaking of the Toleration Act, he is reported to have said, that non-conformity is rendered by that act 'not only innocent but lawful', and that the protecting clauses of the statute 'have put it, not merely under the connivance, but under the protection of the law – *have established it.*' ": see *Attorney-General v. Pearson* (1817) 3 Mer. 353, at p.420; 36 E.R. 135, at p.157. Secondly, and this is the most usual modern sense, the word means to confer on a religion or a religious body the position of a state religion or a state church. In *Marshall v. Graham* [1907] 2 K.B. 112, at p.126, Phillimore J., speaking of the Church of England, said:

> "The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions."

In *Fielding v. Houison* (1908) 7 C.L.R. 393, Barton J. also used the word with this meaning when, speaking of course of Australia, he said, at p.423:

> "The Statute book shows amply that the Church of England and Ireland after the constitution of a legislature never was, nor was any other religious body, an established Church."

Thirdly, when used in relation to the establishment principle discussed in *General Assembly of Free Church of Scotland v. Lord Overtoun* [1904] A.C. 515 the word means to support a church in the observance of its ordinances and doctrines. In that case Lord Robertson, at p.674, pointed out that the establishment principle can be held by churches that are unconnected with the state, and are supported by voluntary contributions alone. Like other members of the House of Lords in that case, he thought that the establishment principle was enunciated in Article III of Chapter XXIII of the Westminster Confession, which read as follows:

> "The civil magistrate . . . hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered and observed."

As to this Lord Robertson said, at pp.680-1:

> "On the specific question about the 23rd chapter of the Confession of Faith, I own that I read with some surprise that doubts had been entertained by learned judges as to the effect of the words that it is the duty of the civil magistrate to 'take order that' 'the ordinances of God' be 'duly settled, administered and observed'. I must still take leave to think that those words do describe what we call Establishment; and I observe that in the *Campbelton Case* . . . where these observations were made, the question before the court was State endowment, which is a different thing."

And Lord Alverstone C.J. said, at p.707:

> "It was strongly urged by the respondents that that article does not enunciate the principle of Establishment or Endowment. As regards Endowment the observation is probably well founded, but even taking the article by itself, in my opinion it distinctly embodies the principle of Establishment."

A fourth possible meaning of the word "establish" is simply to found or set up a new church or religion, but that is obviously not the meaning used in s.116.

The first of these meanings – to grant legal status, recognition or protection – is obsolete and inappropriate in the context of the Constitution. The word was used in that sense when there was an established church, but legal recognition was nevertheless accorded to other churches. If the Commonwealth were forbidden to make any law for establishing any religion in that sense, it would mean that a Commonwealth statute could not validly recognize the existence of any religion or extend to it the protection of the law. For example, laws which recognized the existence of ministers of religion for any purpose (such as the celebration of marriages) would be invalid. There could have been no possible reason for such a constitutional prohibition, and it would be inconsistent with the spirit of the further provision that no law shall be made prohibiting the free exercise of any religion.

The third possible meaning is also inappropriate in s.116. When used in that sense the word is contrasted with endowment, and is used to refer to support of a legal or moral rather than a financial kind. However, it is not the usual sense of the word but is used in a special sense in relation to the "establishment principle". If the word were used in that sense in s.116 the other provisions of that section would be rendered otiose. If the word "establish" in s.116 simply meant support, a law imposing a religious observance, or the requirement of a religious test as a qualification for office, would amount to the establishment of a religion, and the express provisions of the section forbidding these things would have been unnecessary.

The natural meaning of the phrase "establish any religion" is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church. If that sense is applied to the word in s.116, there is no inconsistency with, or repugnancy to, the other provisions of the section. On ordinary principles of construction it is the meaning that ought to be given to the words of the section unless sufficient reason is shown for adopting another meaning.

It is strongly argued on behalf of the plaintiffs that since s.116 was closely modelled on part of the First Amendment to the Constitution of the United States it must be taken to have been intended to have the same meaning as that which had been attributed to the First Amendment in the United States before 1900 when the Constitution was enacted, and further that the United States decisions since that date provide a useful guide to the meaning of the section. In deference to this argument I shall turn to some of the American authorities, but it is necessary to notice that there are a number of differences between s.116 and the First Amendment to the American Constitution. The First Amendment is in the following terms:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It has been held in the United States that these provisions have been extended to the States by the Fourteenth Amendment. The final clause of s.116 (prohibiting religious tests) is modelled on Article VI, Section 3 of the United States Constitution. The establishment clause in the First Amendment is contained in a provision which guarantees a number of fundamental rights, and that circumstance may have influenced the approach of the courts in the United States to the question. More importantly, the words of s.116 did not reproduce verbatim those of the First Amendment. The latter speaks of a law "respecting an establishment of religion" and those words appear wider than those of s.116 which refer to "any law for establishing any religion" – words which look to the purpose of the law rather than to its relationship with a particular subject matter, and which suggest that it is the establishment of one particular religion rather than of religion generally that is proscribed. Moreover s.116 contains an express prohibition of the imposition of any religious observance – a prohibition which is not included in the First Amendment and which, as I have said, would have been unnecessary if "establishing" in s.116 meant "giving assistance or support to". These matters, and the different histories of the two countries, provide reasons why the American decisions as to the meaning of the First Amendment do not necessarily provide any safe guide to the meaning of s.116 of our Constitution.

In any case, with all respect to the argument of the plaintiffs, it had not been established in the United States by the time Federation occurred in Australia that the First Amendment forbad the Congress to give aid, financial or otherwise, to one or more religious bodies. It is true that the Supreme Court had already adopted, as a guide to the meaning of the First Amendment, a statement made by Thomas Jefferson in reply to an address made to him by the Danbury Baptist Association. That statement, which has proved influential in determining the attitude of American Courts to the establishment clause in the First Amendment, is cited in *Reynolds v. United States* (1878) 98 U.S. 145, at p.164, and was as follows:

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, – I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof', thus building a wall of separation between church and state."

In that case the court was dealing with the effect of the free exercise clause, not the establishment clause, and the courts of the United States before 1900 had not had occasion to translate Jefferson's metaphor into terms of specific and practical guidance. The only decision before 1900 in which the Supreme Court considered whether the provision of financial assistance to a body connected with a church violated the establishment clause appears to have been *Bradfield v. Roberts* (1899) 175 U.S. 291. There an appropriation for buildings to be constructed on the grounds of a hospital, a private eleemosynary corporation, was held valid. The facts that the members of the corporation were members of a Roman Catholic sisterhood, and that the title to its property was vested in the sisters, were said to be "wholly immaterial" (see at p.298). It was submitted for the plaintiffs that it was implicit in that decision that if the hospital could have been characterized as a religious corporation, or a corporation that existed for religious purposes, the appropriation would have been invalid. However Peckham J., who delivered the judgment of the Supreme Court, said, at p.297:

> "If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

It seems to me that the learned justice expressly left open the question what the consequence would have been if the hospital had been a religious corporation, and the actual decision of the case does not seem to give the least support to the argument of the plaintiffs, according to which the expenditure of public money on lands owned by a religious body would amount to an establishment of religion. Indeed later mention of the case in the American authorities does not support the plaintiffs' argument as to the significance of the decision. In *Quick Bear v. Leupp* (1908) 210 U.S. 50 it was held that a statutory limitation on the expenditure of public funds, forbidding contracts for the education of Indians in sectarian schools, did not apply to the expenditure of treaty and trust funds administered by the government for the Indians, and that a contract under which it was intended that the Bureau of Catholic Indian Missions should be paid, out of Sioux trust funds, a certain amount for each Sioux in its schools, was not invalid. The question there was primarily one of statutory construction, but in the course of his judgment Fuller C.J. said, at p.81:

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. *Roberts v. Bradfield*, 12 App.D.C. 475; *Bradfield v. Roberts*, 175 U.S. 291."

More recently in *Tilton v. Richardson* (1971) 403 U.S. 672, Burger C.J. said, at p.679:

> "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts* . . . .".

Moreover American commentators, before 1900, had not understood the establishment clause to have the effect of forbidding financial aid to church schools. Thus Cooley in his "Principles of Constitutional Law", 3rd edition, 1898, said, at pp.24-5, that by establishment "is meant the recognition or setting up of a state church, or at least the conferring upon one church of special favours and advantages which are denied to others". This passage provides some support for the alternative submission of the plaintiffs but is opposed to their primary contention.

It seems that it was not until 1947 that the Supreme Court first gave extensive consideration to the effect of the establishment clause on the provision of financial aid to church schools. In *Everson v. Board of Education* (1947) 330 U.S. 1. Black J., who delivered the judgment of the majority, said, at p.16:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

All the judgments appear to favour the view that the establishment clause requires a separation of religious and civil activity and forbids any state aid to religion. Nevertheless, the court, by a majority of 5 to 4, rejected the challenge made in that case to the right of a board of education to reimburse parents for money expended in conveying their children by bus to (amongst other) Catholic parochial schools. The case illustrates the difficulty that one sometimes finds of reconciling a broad statement of principle with the actual decision in cases of this kind. Indeed Jackson J., who dissented in that case, speaking of the majority judgment, said, at p.19, that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."

Since that time the meaning of the establishment clause in the First Amendment has been the subject of what Blackmun J. in the course of a dissenting judgment in *Committee for Public Education and Religious Liberty v. Regan* (unreported, 20th February 1980, No. 78-1369, at p.2 of his judgment),

described as a "continuing and emotional controversy". Although the Supreme Court has evolved a test for the constitutionality of statutes affording aid to church schools, there have been strongly expressed differences of opinion as to the result of the application of that test in particular cases. The test now accepted was stated as follows in *Lemon v. Kurtzman* (1971) 403 U.S. 602, at pp.612-3:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.' "

This third element is of comparatively recent origin and its inclusion was strongly criticized by White and Rehnquist JJ. in *Roemer v. Maryland Public Works Board* (1976) 426 U.S. 736, at pp. 767-8; and since it appears to have suggested one of the arguments put by the plaintiffs in the present case, I may say immediately that it finds no support in the words of the establishment clause in s.116. It would serve no useful purpose for me to discuss the cases on both sides of the borderline, in which the Supreme Court has considered the validity of legislative provisions which authorize the giving of financial aid to church schools, but it is clear that the Supreme Court has not taken the view that the establishment clause entirely forbids the grant of any financial aid to church schools. A few examples will suffice. The Supreme Court has held valid a statute which authorized grants to schools and universities for the construction of buildings and facilities used exclusively for secular educational purposes (*Tilton v. Richardson*), a statute whose purpose was to provide assistance, primarily through the issue of revenue bonds, for higher education in the construction, financing and re-financing of building projects, not including any facility used for sectarian instruction, religious worship or the study of divinity (*Hunt v. McNair* (1973) 413 U.S. 734), a statute which provided grants to colleges provided that the moneys should not be used for sectarian purposes (*Roemer v. Maryland Board of Public Works*) and a statute reimbursing schools for performing various testing and reporting services required by state law (*Committee for Public Education and Religious Liberty v. Regan*), although, in each of these cases, church schools as well as secular schools benefited under the statutes. On the other hand there are many decisions of the Supreme Court which have invalidated legislation giving aid to church schools, and some of those cases are – at least for someone from another jurisdiction – difficult to reconcile with those to which I have just referred.

Even if the United States authorities were treated as applicable to s.116, they would not give to the argument advanced by the plaintiffs the support which the plaintiffs sought to draw from them. But in any case, for a number of reasons, I cannot regard the United States decisions as containing an exposition which should be treated as authoritative in its application to s.116. In the first

place there are the differences, to which I have already referred, between that section and the First Amendment. Secondly, the history of the United States, which provides the background to the Constitution of that country, has been very different from that of Australia. Thirdly, as I had occasion to point out in *Attorney-General of the Commonwealth; Ex rel. McKinlay v. The Commonwealth* (1975) 135 C.L.R. 1, at p.47, the courts of the United States, in construing the Constitution, have recourse to material which it is our practice to reject. It would seem paradoxical if we, although forbidden to consider the debates of our own constitutional conventions for the purpose of discovering what the delegates thought was the meaning of a particular provision accepted by the convention, should nevertheless, in construing s.116, indirectly give weight to the opinions of Thomas Jefferson as to the meaning of the similar words of the First Amendment. Finally, the course of the decisions in the United States shows that the test which has been adopted in that country, so far from being clear and predictable in its operation, has led, in its application, to continuing controversy. In any case, we should not substitute for the words of s.116 a test which those words do not appear to warrant, particularly when it does not commend itself by any obvious considerations of justice or convenience.

It was submitted on behalf of the plaintiffs that the words of s.116 should be given as broad and liberal a construction as possible. That would not justify giving the words of the establishment clause an expanded meaning which they do not naturally bear. In any case, the establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right; indeed, the purpose for which it was inserted in the Constitution remains obscure. There is no reason to give such a provision a liberal interpretation. In the end it remains necessary to determine the meaning of the words of s.116 themselves.

For the reasons I have given, I consider that the words "The Commonwealth shall not make any law for establishing any religion", where they appear in s.116, mean that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.

It may be a question of degree whether a law is one for establishing a religion. However, on no view of the evidence in the present case can it be said that any of the laws in question infringes s.116, if that section is given the meaning which I have attributed to it. If it be assumed that in some schools religious and secular teachings are so pervasively intermingled that the giving of aid to the school is an aid to the religion, and if it be further assumed that some religions, which conduct more schools than others, will receive more aid than others, it still does not follow that any religion is established by the legislation.

If the administration of the *Schools Commission Act* 1973 requires that officers of the Commonwealth be closely involved with religious authorities, that also does not mean that the Act establishes any religion. The primary purpose of the challenged legislation is the advancement of education within Australia. That would, no doubt, not be decisive if the legislation had the further purpose of establishing any religion. However, it is impossible to say, on any view of the statutory provisions in question or of the evidence in the case, that the challenged legislation has the purpose or effect of setting up any religion or religious body as a state religion or a state church, even for limited purposes only. None of the laws in question is a law for establishing religion within s.116.

No doubt some members of the public hold strong and sincere views on the question whether any government should provide financial aid to church schools, but the resolution of the differences that exist must be left to the democratic processes which exist under the Constitution; s.116 does not resolve them.

For the reasons I have given I consider that the plaintiffs cannot succeed in their action and that judgment should accordingly be given for the defendants.

STEPHEN J. The judgment of Wilson J. relieves me of the need to describe the facts and circumstances of these proceedings. That judgment describes the character of the parties to and intervenors in the proceedings, the plaintiffs' submissions, the legislation of the Commonwealth which is impugned and the factual background against which that legislation operates.

At the heart of this case is the question whether Commonwealth laws offend against s.116 of the Constitution when they grant financial assistance to the States on condition that the States apply the sums granted in paying for capital projects and recurrent expenses of non-government schools. A similar question arises concerning moneys appropriated for spending on such schools in the Territories.

Section 116 is as follows:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

Some things about the section are self-evident. It is not, in form, a constitutional guarantee of the rights of individuals; with it may be contrasted s.117 which, like s.80, at least gives promise of guaranteed rights, however illusory that promise may so far have proved in practical operation – *The King v. Archdall and Roskruge: ex parte Carrigan and Brown* (1928) 41 C.L.R. 128 and *Henry v. Boehm* (1973) 128 C.L.R. 482. Section 116, like s.99, instead takes the form of express restriction upon the exercise of Commonwealth legislative power.

The section contains four quite distinct restrictions, each concerned with one aspect of the relationship between Church and State and each recalling phases of that relationship as it has evolved through centuries of English history. The first three prohibit the making of laws of particular kinds, laws "for" the doing of certain things. The fourth prohibits the imposition, whether by law or otherwise, of religious tests for the holding of Commonwealth office. It is the first of these four restrictions that is here in question. It differs in substance and form from the second and third restrictions. They are directed against the "imposing" or the "prohibiting" of aspects of religious practice; unlike them, the participle "establishing" used in the first restriction does not describe a prohibited law's impact upon the citizen but its effect upon religion.

What it is which constitutes "establishing any religion" has, of course, been central to the debate in this case. The plaintiffs say that "establishing" in s.116 includes the provision by the Commonwealth of funds to schools associated with churches. The predominant view of the various defendants and intervenors is, I think, that "establishing" means the constituting of a religion as an officially recognized State religion.

The context provided by s.116 is enough to show that what is perhaps the most usual meaning of "establishing", that of setting up or founding, while appropriate where "establish", "established" and "establishment" variously occur in covering clauses of the *Constitution Act* and in ss.106, 107 and 121 of the Constitution, is inappropriate in s.116. In that section the conjunction of "establishing" with "law" and with "religion" gives it its particular meaning.

It is that meaning which the Shorter Oxford English Dictionary alone gives to it when specifically related to religion, namely "to place (a church or a religious body) in the position of a state church". This I have no doubt is the meaning of the verb "establish" and of its present participle according to common usage when used with reference to a church or religion. Only if convincing reasons can be shown will it bear a different or more particular meaning. The plaintiffs, in seeking to make good the proposition that the provision by law of funds for church schools is an establishing of religion, urge several reasons for so saying, while not conceding in the first place that "establishing" bears the meaning which I would assign to it according to ordinary usage.

The plaintiffs' argument begins by giving to "religion" a meaning which extends beyond a particular religious philosophy so as also to include the religious community which supports that faith and also its organization and practices. So much may readily enough be accepted: to speak of a religion being established by the laws of a country may well be to include much more than the act of according material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith; it would certainly include the recognition of a particular religion or sect, with its priestly heirarchy and tenets, as that of the nation.

The plaintiffs point to the undoubted imprecision surrounding the concept of establishment as applied to the Church of England. Again, it may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment. Over the centuries the rights enjoyed by the Church of England, as the established church, have greatly changed, as has that subjection to temporal authority which is the concomitant of establishment. Dibdin, in *Establishment in England*, traces the various phases of the Church's establishment and the disappearance, over time, of many of those characteristics which once went to make up its status as the established Church. The plaintiffs rely both upon his adoption, at p.113, of Lord Selborne's statement that in different countries the particular forms and conditions of Establishment differ and upon his comment that it might be added that in England those forms and conditions have themselves "differed greatly from time to time". Dibdin concludes, at p.116:

> "The Establishment has survived so many modifications that, whatever we may think it would be rash to assert that the irreducible minimum has now been nearly reached".

The status of establishment which the Church of England has long enjoyed in England has no single characteristic but, rather, is the sum total of all the mutual relations for the time being existing according to law between Church and State. No single element of those relations, viewed in isolation, itself creates establishment. Because the status of establishment is, in England, the outcome of a complex of relationships does not make a law which creates one element of that complex a law "for establishing" a religion. Still less does it mean, as the plaintiffs also contend, that any law which may represent a step in the direction of, or may be thought to have a tendency towards, producing the end result of the establishment of a religion is a law which offends against s.116.

The plaintiffs rely upon matters of colonial history as affecting the meaning of "establishing" in s.116. First, they say that in 19th century Australia there was for a time a recognition of a variety of representative Christian denominations. This was accompanied by the granting of financial aid by colonial

governments to those denominations and to the schools conducted under their respective auspices. By the end of the century however, under the influence of voluntaryist and separationist views of the relationship which should exist between Church and State, each of the Australian colonies had by legislation ended this financial support of particular denominations and of church schools. This being the historical setting in which the terms of the federal compact were debated, it is said to colour the meaning to be given to "establishing" in s.116 so as to include within its prohibition grants of financial support to schools affiliated with particular churches, grants which each of the federating colonies had abrogated in the three decades preceding federation.

Australia's colonial history does indeed disclose, first, something at least approaching official recognition of the Church of England; followed, however, by a general recognition of a wide variety of denominations, accompanied by impartial financial assistance to all their churches and schools; then, in the latter part of the 19th century, there occurred a move towards complete separation of Church and State, with the abolition of all financial aid to churches and to church schools. It is with this last development that the plaintiffs would seek to associate s.116, contending that it represents a continuation of the policy of colonial legislatures of the late 19th century.

Perhaps the first thing to be observed in examining this proposition is the marked contrast which exists between the language of the colonial Acts which abolished financial aid to churches and church schools and the words of s.116. It is in terms of "the abolition of state aid to religion" (Victoria), of the prohibition of "future grants of public money in aid of public worship" (New South Wales), of the discontinuance of "grants from the revenue in aid of religion" (Queensland), of the "termination of the parliamentary ecclesiastical grant" (Western Australia) that colonial legislatures ended their financial support of denominations. Likewise, the termination of state financial aid to church schools was also expressed in precise terms which made no reference to the concept of the establishment or disestablishment of religion.

The language of the first restriction in s.116 stands in marked contrast to the precise terms in which these colonial measures were expressed. These measures nowhere refer either to "establishing" or "establishment" nor, for that matter, to "disestablishment", a phrase then much in vogue in connexion with the current disestablishment debate in the United Kingdom. The colonial Acts had no need to deal in such concepts because there existed in Australia no established church capable of being disestablished. Section 116, on the other hand, specifically speaks in terms of a prohibition against laws for "establishing any religion". Its language is singularly ill-adapted to ensuring that the spirit of the colonial measures should persist in the new polity which emerged from federation. It is, however, entirely apt if concerned with the quite different subject of the creation of a state church in Australia; something which had

come close to occurring in the early colonial period but which s.116 would prevent for the future. So understood, it is natural that the first restriction in s.116 should speak in terms quite different from the language of the previous colonial legislation. It is significant that, writing in 1901, Quick and Garran should say of the opening words of s.116: "by an establishment of religion is meant the erection and recognition of a State church or the concession of special favours titles and advantages to one Church which is denied to others" – *Annotated Constitution*, p.951. They clearly did not regard it as continuing the policy of the colonial measures. In saying what they did they were reflecting the view then prevailing in the United States as to the effect of the First Amendment, of which more hereafter.

The very form of s.116, consisting of four distinct and express restrictions upon legislative power, is also significant. It cannot readily be viewed as the repository of some broad statement of principle concerning the separation of Church and State, from which may be distilled the detailed consequences of such separation. On the contrary, by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.

The plaintiffs place much reliance upon what is said to have been the influence of the United States Constitution in the framing of s.116. The argument is that words of the First Amendment are similar to those of the first restirction in s.116; that the First Amendment was, by the time of Federation, understood in a sense which would forbid the grant by the federal government of aid to church schools; and that, by using similar language, the framers of our Constitution must have intended that the first restriction in s.116 should have a similar operation.

The argument fails on two counts. The more obvious is that the wording of the two measures differs in an important respect; the more telling is that the First Amendment had not, by the 1890s, come to bear the meaning which the plaintiffs would seek to assign to the first restriction in s.116. As to wording, the First Amendment requires that "Congress shall make no law respecting an establishment of religion", a restriction of wider scope than s.116's prohibition of laws "for establishing any religion". To illustrate this wider scope one may use another of the restrictions in s.116, thus avoiding the effect of any pre-conception about the meaning of "establishing": a law which did no more than require all places of entertainment to be closed on Sundays would not be a law "for" imposing any religious observance whereas it might well be one "respecting" the imposition of some religious observance. The difference of wording, and the effect attributed to "respecting" in the American decisions of this century deprive those modern decisions of value in the interpretation of s.116.

Then, as to the understanding of the meaning of the First Amendment prevailing in the 1890s; despite its different and wider wording, the First Amendment was understood as requiring only that no national church should be recognized or created and no one persuasion or mode of worship should be given any special privilege or particular recognition. This is made clear in the judgment of the U.S. Court of Appeals for the District of Columbia in *Roberts v. Bradfield* (1898) 12 App. D.C. 453; the judgment of the U.S. Supreme Court when the case went on appeal, reported in (1899) 175 U.S. 291, does not, on analysis, reflect any different view. That this was the then prevailing view of the First Amendment also emerges very clearly from Cooley's *Constitutional Limitations*, 6th ed. (1890), at p.575 et seq and his *Principles of Constitutional Law*, 3rd ed. (1891) at p.224 and from Storey's *Commentaries*, 5th ed. (1891), pp.631-634. As Von Holst said in his *Constitutional Law of the United States of America* (1887) at p.227 "Congress is not only prohibited from making any religion whatever a state religion or any church whatever a state church, but it cannot make any laws favouring one religion or church more than any other".

It follows that even if the framers of our Constitution had seen fit to adopt verbatim the terms of the First Amendment, they would have been doing no more than writing into our Constitution what was then believed to be a prohibition against two things, the setting up of a national church and the favouring of one church over another. They would not have been denying power to grant non-discriminatory financial aid to churches or church schools.

Section 116 is a constitutional provision of high importance. As the plaintiffs say, it does indeed provide important safeguards for religious freedom for Australians, at least so far as that freedom might otherwise be in jeopardy from laws of the Commonwealth. It does so by prohibiting three avenues of possible legislative encroachment upon that freedom – the elevation of one church above all others, the imposing of particular religious observances and the proscribing of any religious worship. It also prohibits one avenue of encroachment open to legislature and executive alike – the imposition of religious tests for office holders. These four prohibitions, the fruit of long experience of religious intolerance in the United Kingdom, ensure that Parliament will observe that "true distinction between what properly belongs to the Church and what to the State" – *Reynolds v. United States* (1878) 98 U.S. 145 at p.168. They say nothing, however, which would impugn the validity of the legislation which the plaintiffs seek to attack. Because of the meaning which, in my view, "establishing" bears in s.116, their attack based upon that section fails.

Quite distinct from the plaintiffs' general attack on validity founded upon s.116 is their contention that the legislation here in question, so far as it affects States as distinct from Territories, is not authorized by s.96 of the Constitution.

It is said to lack the necessary quality of providing for grants of financial assistance to States on terms and conditions thought fit by Parliament. The argument is that the grants for building and equipment projects and the recurrent expenditure of non-government schools are not grants of financial assistance to the States at all. The States may elect to accept or reject the grant but that is the full extent of their role. If accepted, a State acts as a mere conduit; it dervies no benefit as a body politic.

In pursuing this argument the plaintiffs are confronted at the outset with the decision of this Court in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty Ltd* (1939) 61 C.L.R. 735. They do not canvass the correctness of *Moran's* case but instead seek to distinguish it; accordingly, the dissatisfaction which Dixon C.J. expressed concerning it in *Victoria v. The Commonwealth* (1957) 99 C.L.R. 575 (*The Second Uniform Tax* case) at p.607 does not now arise for consideration. In the absence of any present challenge to the correctness of *Moran's* case and the doctrine which has developed from it, I conclude that the plaintiffs must fail on this issue; I do not regard *Moran's* case as distinguishable.

It is true that in *Moran's* case the initiative for the legislation there under challenge came from the States, which sought the co-operation of the Commonwealth in a proposed wheat stabilization scheme. The States also played a somewhat more active role in determining the recipients of Commonwealth funds. But, as Dixon C.J. observed in *The Second Uniform Tax* case at p.605, the non-coercive power conferred by s.96 "is susceptible of a very wide construction in which few if any restrictions can be implied" and the course of decisions have amplified the power and tend towards "a denial of any restriction upon the purpose of the appropriation or the character of the condition". So long as that course of decisions stands, I am unable to see any ground for distinguishing the present case. In any event, I would regard the present legislation as in substance providing financial assistance to the States. Non-government schools have come to form a significant segment of each State's educational system, as is attested by the financial aid which each State provides for such schools, quite independently of Commonwealth grants. Grants by the Commonwealth of financial aid, directed to those schools through the agency of the States, reduces the burden upon the States and by that means assists them financially.

The plaintiffs' attack based upon s.96 must in my view fail. It follows that I find it unnecessary to determine the questions of standing of parties which were argued. These are major questions which are better resolved in a case which requires their determination.

I would dismiss the action.

MASON J. The facts and the relevant statutory provisions have been set out in the reasons for judgment prepared by Wilson J.

Why it was considered necessary to include in the Constitution s. 116 or its first clause is not altogether clear. Mr. H. B. Higgins thought that the reference to Almighty God in the preamble might have yielded by implication a power in the Commonwealth Parliament to legislate upon the topics mentioned in the section. Quick and Garran considered that it may have been inserted to forestall any possibility of amending the Constitution by providing for any of the matters prohibited. To others it may have seemed that there was a need to place some restraint upon the exercise of the legislative power with respect to marriage conferred by s. 51(xxi.). Reflection upon the question is speculative and it does not assist in the resolution of the problems which now arise.

I agree with Wilson J. that the first clause in the section forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution. Quick and Garran in *The Annotated Constitution of the Australian Commonwealth* say of s. 116 (at p. 951): "by the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others." With one qualification, I agree with this statement. The qualification is that to constitute "establishment" of a "religion" the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.

Lumb and Ryan in *The Constitution of the Commonwealth of Australia Annotated*, 2nd ed., p. 362, rightly observe that it is instructive to compare s. 116 with the First Amendment to the United States Constitution. They say (at p. 362):

> "Section 116 refers to the establishment of *any* religion while the American clause prohibits the establishment of religion. This suggests that what s 116 is aimed at is any type of assistance tending to promote the interests of one Church or religious community as against others. A non-discriminatory law which is directed towards assisting religion generally may fall foul of the American provision but may not be invalid under s 116."

The authors correctly regard the section as aimed at preserving religious equality or equality between religions, but it will be noted that they consider that the prohibition extends to any form of assistance "tending to promote the interests of one Church . . . as against others".

The view expressed by Quick and Garran strongly reflects the interpretation of the "establishment clause" in the First Amendment favoured by Cooley in his *Principles of Constitutional Law*, 3rd ed. (1898). Cooley said (p. 224):

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."

The view of Lumb and Ryan more closely follows the opinion of Story expressed in his *Commentaries on the Constitution of the United States*, 5th ed. (1891), s. 1877:

> "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government."

But, unlike Cooley and Quick and Garran who direct their comments to the prohibition against establishment of religion specifically, Story and Lumb and Ryan speak more generally of the effect of the First Amendment and s. 116 viewed as a whole.

The opinions of the two American textwriters reflected the judicial decisions on the "establishment clause" at the turn of the century. The decision of the Supreme Court in *Bradfield v. Roberts* (1899), 175 U.S. 291, does not deal directly with the question. However, the judgment appealed from, that of the United States Court of Appeals for the District of Columbia Circuit (1898), 12 App. D.C. 453, is instructive. The Court said (at p. 467):

> ". . . it seems to be the opinion of learned commentators of very high authority, that the declaration was intended to secure nothing more than complete religious liberty to all persons, and the absolute separation of the Church from the State, by the prohibition of any preference, by law, in favor of any one religious persuasion or mode of worship."

The Court then refers to the relevant passages in the works of the commentators, including Cooley and Story. On appeal the Supreme Court did not express any disagreement with what the Court of Appeals had said.

Accepting for present purposes that there was a difference, albeit slight, in the interpretation given by Cooley and Story to the prohibition against establishment of religion and that the Court of Appeals in *Bradfield v. Roberts* favoured the Story interpretation, this provides no support for the plaintiffs' case. Indeed, it provides a persuasive refutation of that case. Though Story possibly went further than Cooley in perceiving in the prohibition against establishment a prohibition against the giving of *any* preferential assistance to

one church or religion over another, and in this he may possibly have been supported by the Court of Appeals, neither Story nor Cooley claimed that the First Amendment proscribed assistance to churches or religions generally, let alone assistance to churches which was limited to education.

Even if the interpretation given to the "establishment clause" in the more recent decisions of the United States Supreme Court more closely accords with the interpretation of s. 116 for which the plaintiffs contend, what is important for our purposes is that the interpretation of the clause in the First Amendment which was accepted at the end of the nineteenth century was that expressed by Cooley and Story. It is that interpretation which the framers of our Constitution would have had in mind when they framed s. 116 and this, no doubt, was one reason why Quick and Garran adopted it as an acceptable construction of the first prohibition contained in the section. I do not accept the plaintiffs' submission that Bryce's interpretation of the First Amendment supports their case and I note that the Court of Appeals in *Bradfield v. Roberts* did not refer to it.

Although in some circumstances it is permissible to construe a grant of legislative power so as to apply it to things and events coming into existence and unforeseen at the time of the making of the Constitution, so that the operation of the relevant grant of power in the Constitution enlarges or expands, a constitutional prohibition must be applied in accordance with the meaning which it had in 1900. As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted. Consequently, the content of the prohibition against establishment of religion should not be expanded by reference to a more extensive interpretation given to similar words in the First Amendment by judicial decisions pronounced since 1900, assuming, without deciding, that those decisions have such an effect.

The text of s. 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the First Amendment which speaks of the "establishment of religion", not the "establishment of any religion". And, as we shall see, the history of the relationship between Church and State in the United Kingdom and in the Australian colonies in the nineteenth century suggests that the first clause in s. 116 was the expression of a profound sentiment favouring religious equality in the Australian colonies.

The plaintiffs attach much importance to the distinction between "establishing" in s. 116 and "establishment" in the First Amendment. The former, they say, is wider than the latter which may have a special and limited meaning. Indeed, the suggestion is that "establishing" was selected to ensure that no narrow interpretation would be made to the prohibition. The distinction in

meaning, if any, between the words is so slight that it does not supply a sound basis for a difference in interpretation. Both words may be used in a number of senses, but in the context of religion "establishing" should be understood in the same sense as "establishment" in relation to Church and State. This is a topic to which I shall return.

There is a second distinction between the language of s. 116 and the First Amendment. We speak of any "law *for* establishing" any religion. The Americans speak of a law "*respecting* an establishment" of religion. In *Lamshed v. Lake* (1958), 99 C.L.R. 132, at p. 141, Dixon C.J., when referring to s. 122, equated "for" with "with respect to" in its application to the government of the Territory. Here, however, we are dealing, not with a grant of legislative power, but with a prohibition against the exercise of legislative power. In such a context "for" is more limiting than "respecting"; "for" connotes a connection by way of purpose or result with the subject matter which is not satisfied by the mere circumstance that the law is one which touches or relates to the subject matter. In this respect the first prohibition in s. 116 is narrower than its American counterpart.

Section 116 is directed to the preservation of religious equality, freedom of religion and, as Latham C.J. pointed out in *Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth* (1943), 67 C.L.R. 116, at p. 123, "the right of a man to have no religion". The inclusion in the section of the prohibitions against laws imposing religious observances and against requiring religious tests as a qualification for any office or public trust indicate that the scope of operation of the first clause of the section is rather more limited than the plaintiffs' argument would admit. The plaintiffs argue that the first clause prohibited the giving of any aid or assistance to religion, financial or otherwise. The imposition of religious observances and the administration of religious tests as a qualification for office would both come within the expanded concept of establishment favoured by the plaintiffs. Yet they are each the subject of separate and explicit constitutional prohibition.

Even so, as I have already indicated, the principal obstacle to an acceptance of the plaintiffs' argument lies in the words "any law for establishing any religion". It is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion. The mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education, falls short of "establishing" a "religion" as we understand the expression. By it we mean the authoritative establishment or recognition by the State of a religion or a church as a national institution.

This is not only the meaning which is given in the standard English dictionaries, but it is also the meaning which it has in our minds and had in the minds of the citizens of the Australian colonies at the end of the nineteenth century. They were acutely familiar with the relationship between Church and State in England and Wales, Scotland and Ireland. They were aware that the Church of England, the Church of Scotland and the Church of Ireland respectively were referred to as "the Established Church". And they had followed the move to disestablish the Church of England, a move which had generated great political controversy in the first half of the century. To them the issue of establishment was by no means remote. It was a burning question because a large proportion of the Australian population in the second half of the nineteenth century consisted of Non-conformists and Roman Catholics who had suffered from religious discrimination in their homelands and were devoutly opposed to its resurgence in the colonies, which were, after all, British colonies where the Church of England had the largest following. To the Australian colonists the preservation of religious equality was perhaps more important than the preservation of religious freedom for the simple reason that they had experienced the disadvantages of religious inequality and it posed a more immediate threat than the absence of religious freedom.

It is of great significance that, despite their very comprehensive researches into the history of the relationship between Church and State in the Australian colonies, the plaintiffs have been unable to discover any instance in which the provision of financial assistance to churches to be spent on education, was described as "establishing religion" or "establishing a church".

The plaintiffs argue that a law which brings about one of the results or characteristics that go to make up the establishment of religion is itself a law "for establishing" religion. Thus, they submit, a law which gives financial aid to religious schools is a law for establishing religion because the giving of financial aid to religious schools, taken with other support for religion, constitutes the establishment of religion. If it were otherwise, they say, the establishment of religion could be secured by a series of laws no single one of which infringes the constitutional prohibition. This is to assume that each law must be viewed in isolation in deciding whether there is a violation of the prohibition. The assumption is not justified. It is necessary to view each law in its context and that context will include the relationship between Church and State as it exists under the law generally. When that is done it may appear that a particular law offends s. 116 because its operation, taken in conjunction with that of other laws, is seen to establish a church or religion.

The position of the establishment provision as the first clause in s. 116 evidences the importance which was attached to it. Nevertheless, to repeat what I said earlier, apart from the second and fourth clauses, the form of religious inequality which has been forbidden by s. 116 is that form of religious inequality which is expressed by the critical words "any law for establishing any religion".

The interpretation which I give to the first clause of s. 116 is fatal to the plaintiffs' case to the extent to which it was based on the section. The statutes whose validity the plaintiffs attack provide financial assistance for church schools without differentiation between religions or churches. True it is that very much more aid is given to Roman Catholic schools. This is because the Roman Catholic Church operates a much larger number of schools than other churches or religions. The provision for church schools forms part of a general scheme for the funding of Government and non-Government schools. Therefore there is simply no basis for saying that the relevant statutes are laws for establishing the Roman Catholic Church as a national institution. There is just as little basis for saying that they are laws for establishing the Christian religion.

In reaching this conclusion I have assumed that the prohibitions contained in the section apply to appropriation statutes enacted in compliance with s. 83 and to statutes enacted pursuant to s. 96. Laws made pursuant to these provisions are not an exception to the general proposition expressed by Latham C.J. in *Jehovah's Witnesses* (at p. 123), that "Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made". The purpose of appropriation statutes was described by Isaacs J. in *The Commonwealth of Australia v. The Colonial Ammunition Company Ltd.* (1924), 34 C.L.R. 198, at p. 224, as "financial, not regulative". Perhaps a similar comment may be made about the purpose of laws made under s. 96. But this is not a ground for saying that appropriation statutes and s. 96 laws stand outside the general prohibition contained in s. 116. Yet it may be a reason for saying that it is much more difficult to show that they infringe the constitutional prohibition, though, like Wilson J., I can conceive that an appropriation of a very large sum to a church as an integral element in a scheme to establish that church as a national church would fall foul of the section. The law would then fall, not because the purpose is not a purpose of the Commonwealth, but because the statute violates a constitutional prohibition.

The statutes by which moneys are granted to the States for the purpose of assisting religious schools are the subject of an additional challenge. The plaintiffs submit that the statutory provisions travel beyond the authority which s. 96 confers by depriving the States of any choice or freedom of action in relation to the moneys provided, other than the freedom to accept or reject the grant. When States accept the grant on the terms set out in the legislation they are obliged by those terms to pay money to schools and school authorities nominated by the Commonwealth and to enter into agreements the terms of which are fixed by the Commonwealth. As Wilson J. observes, the conditions attached to the grant require the school or school authority to account to the Commonwealth for moneys spent and to provide statistical information to the Commonwealth.

But the course of judicial decision in this Court establishes that the Commonwealth may condition its grant under s. 96 so as to make the State a conduit pipe in channelling the fund to the intended recipient. As early as 1926, in *The State of Victoria v. The Commonwealth* (1926), 38 C.L.R. 399, the *Federal Aid Roads Act* 1926 was upheld, notwithstanding that it bound the State to apply money to an object selected by the Commonwealth, that the object was outside Commonwealth legislative power and that the amount of the payments was to be fixed by a Commonwealth Minister. Subsequently, in *The State of South Australia v. The Commonwealth* (the first *Uniform Tax* case) (1942), 65 C.L.R. 373, the Commonwealth legislation introducing uniform taxation was upheld. A central element in that legislation was a provision in the *States Grants (Income Tax Reimbursement) Act* 1942 (s. 4) which provided for the giving of financial assistance to a State on condition that the State did not impose a tax on incomes in the relevant financial year. Latham C.J., Rich, McTiernan and Williams JJ. (Starke J. dissenting) held that the Act was not directed towards destroying or weakening the constitutional functions or capacities of the States and was therefore not invalid on that ground. The Court drew a distinction between a law which offers an inducement to a State not to exercise its powers and a law which creates or attempts to create a legal compulsion to do so (see pp. 417, 464).

Later, in *The State of Victoria v. The Commonwealth* (the second *Uniform Tax* case) (1957), 99 C.L.R. 575, Dixon C.J., who had not participated in the first *Uniform Tax* case, though suggesting that there was support for a more limited construction of s. 96, went on to say (at p. 609), "the course of judicial decision has put any such limited interpretation of s. 96 out of consideration".

For these reasons the plaintiffs are not entitled to the relief sought in the action.

MURPHY J. The statutory provisions, details of grants, and an outline of the facts are set out in Mr Justice Wilson's judgment.

The plaintiffs contend (apart from its principal contention) that the Acts which purport to be grants under s.96 of the Constitution are not authorised by s.96. There is no force in the contention, the basis of which has already been rejected in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735; *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575.

The plaintiffs' principal contention is that the challenged legislation is invalid in so far as it provides for financial aid to non-government schools.

Almost all the non-government schools are what are known as "church" or "denominational" or in the United States, "sectarian" or "parochial" schools. All these have a religious element. The general picture is that as well as secular instruction each of the church schools engages in instruction in its particular religion and engages in religious observances and worship. Most of the buildings are adorned with religious symbols. The churches to which the schools are related exercise varying degrees of supervision over the conduct of the schools. The recipients of the moneys channelled through the challenged Acts are churches associated with the different religions. There was strong contention between the plaintiffs and the defendants over the extent and degree of the religious element, although in the end, much was agreed. My legal conclusions do not depend on any difference between the opposing factual claims.

The plaintiffs rely upon s.116 of the Constitution which states:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

The marginal note is "Commonwealth not to legislate in respect of religion".

The plaintiffs rely particularly upon that part of s.116 known as the establishment clause which prohibits the Commonwealth from making "any law for establishing any religion". The plaintiffs and defendants have advanced opposing views on the meaning in s.116 of the words or phrases "any law", "for", and "establishing any religion". Much of the argument involved reference to the establishment clause of the United States Constitution (in the First Amendment) which reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

and also to Article VI of the Constitution:

> ". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States".

Section 116 is very similar to, and obviously taken from, the provisions of the United States Constitution, and the prohibition added against laws "for imposing any religious observance".

The principles appropriate to construing such constitutional expressions are well recognised, even if sometimes overlooked. "We must remember . . . that it is a constitution we are construing and it should be construed with all the generality which the words used admit." *R. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd.* (1965) 113 C.L.R. 207, 225, Chief Justice Dixon, Justices Kitto, Taylor, Menzies, Windeyer and Owen.

"any law"

The Commonwealth Government contended that s.116 did not apply to grants or conditions on grants under s.96, nor to appropriation laws under s.81 of the Constitution. It asserted that Parliament could under s.96 grant say a hundred million dollars to the States on the condition that the money was used "for establishing a religion" and could, under s.81 of the Constitution, appropriate moneys directly for the building of a cathedral, or for the propagation of religious tracts, free of any prohibition in s.116. I would reject these propositions.

Chief Justice Latham said in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, 123:

> "Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws.
>
> Accordingly no law can escape the application of s.116 simply because it is a law which can be justified under ss.51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s.116 imposes."

Mr Justice McTiernan said (at p.156): "Section 116 imposes a restriction on all the legislative powers of the Parliament."

The United States' establishment clause is also overriding. As Justice Douglas said delivering the opinion of the Court in *Zorach v. Clauson* 343 U.S. 306, 312 (1933): "The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute".

Section 116 applies to any law, whether made under s.51, s.52, s.96, s.122 or any other legislative power.

"for"

In the Australian Constitution, the phrase "for establishing" is used instead of the phrase "respecting an establishment of" used in the United States Constitution. The word "for" in this context embraces the meaning "with respect to". In *The Oxford Dictionary* 1901 one of the definitions of "for" was "As regards, with regard or respect to, concerning". As Chief Justice Dixon said in *Lamshed v. Lake*, (1958) 99 C.L.R. 132, 141 (dealing with s.122): "To my mind s.122 is a power given to the national Parliament of Australia as such to make laws 'for' that is to say 'with respect to', the government of the Territory". He went on to state that the test of whether a law was "for" the government of the Territory is whether it was relevant to that subject matter. The same applies to s.116. If a law is relevant to establishing any religion, it is "for" establishing any religion.

The marginal note to s.116 confirms this correspondence of "for" and "with respect to". Generally little attention is paid in the interpretation of ordinary Acts to marginal notes, although in *R. v. Schildkamp* (1971) A.C.1 Lords Reid and Upjohn considered that marginal notes should not be rejected completely as aids. But here we are dealing with a constitution. The marginal notes are part of the Constitution and if they throw only a little light, that light is in favour of a broad construction which would embrace "with respect to". However, whether "for" is read narrowly, meaning "with the purpose of" or "with the object of" as the defendants contend, or as meaning or including "with respect to" as the plaintiffs contend, is not decisive. Even if the plaintiff's view of "for" is accepted, the challenge will fail if the defendant's view of "establishing any religion" is accepted. On the other hand, even if the defendant's view of "for" is accepted the plaintiffs will succeed if their view of "establishing any religion" is accepted.

"*establishing any religion*"

Three meanings of "establishing" in s.116 have been advanced. The first and narrowest means establishing one national church or religion. The second ("preferential") means preferring, by sponsorship or support, any religion over others (and therefore includes the first). The third ("separation") means any sponsorship or support of religion (and therefore embraces the first two). These meanings are therefore not mutually exclusive. The separation interpretation of the clause means that it forbids not only a national church, and any preference to one religion over others, but also sponsorship or support (including financial support) of any religion. The ordinary principle that constitutional provisions should be read not narrowly, but "with all the generality which the words admit", strongly supports the adoption of the more general reading, that is, the separation interpretation. There are other considerations which support the adoption of this interpretation. The guarantees of personal freedom against the imposition of any religious observance and the prohibition of free exercise of any religion and the requirement of any religious

test should be read widely consistently with their brevity and with constitutional usage. As I said in *Attorney-General (Cth) Ex rel. McKinlay v. The Commonwealth* (1975) 135 C.L.R. 1, 65 "Great rights are often expressed in simple phrases." It would detract greatly from the freedom of and from religion guaranteed by those clauses if they were to be read narrowly. In the same way the establishment clause should be read widely. To refuse to read the establishment clause with generality because so read it covers some of the ground covered by the other guarantees in s.116 is to interpret s.116 as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion. It would be just as incorrect to narrow the broad meaning of free exercise of any religion because otherwise it would overlap with the clauses prohibiting imposition of religious observances and religious tests. Some laws would breach more than one, even all the clauses – for example a requirement that every candidate for office under the Commonwealth make a particular religious observance. The idea that the establishment clause should be read down so as not to overlap with the free exercise clause has been rejected in the United States (See *Engel v. Vitale* 370 U.S. 421 (1962)).

To read s.116 as prohibiting only laws for establishing one religion or church, but permitting laws for establishing a number of religions or churches is inconsistent with the comprehensive terms of the prohibition. There is no warrant for reading "any religion" as "any one religion"; yet this is necessary if "establishing" refers only to the recognition or setting up of one national church or religion. Such a reading trivialises the section. It would allow laws for sponsoring and supporting (financially and otherwise) a number of religious (even in the most discriminatory and preferential way) as long as the laws stopped short of setting up one national church or religion. The same objection applies to the adoption of the "preferential" interpretation. It requires that the prohibition against laws for establishing "any" religion be read down so that "any" means "only one or some", instead of "every", or "all". This distorts the meaning of the section. It would forbid preference such as financial assistance to any one religion over others (and presumably to some but not all) but would permit such preference or assistance to all religions over no religion. If a law for financial support for one or more religions but not all (that is, a preferential or discriminatory law) violates the prohibition against "any law for establishing any religion", it follows irresistibly that a law for financial support for all religions also violates the prohibition. There is not the slightest hint in the words used in the establishment clause that it forbids only discriminatory or preferential laws. The preferential interpretation would convert the clause into one permitting laws for establishing all religions. This would make a farce of the section and would deny that s.116 is a guarantee of freedom from religion as well as of religion. This reading is repelled by the emphatic use of "any".

As Chief Justice Latham said in the *Jehovah's Witnesses* case: "Section 116 applies in express terms to 'any religion', 'any religious observance', the free exercise of 'any religion' and any 'religious test'. Thus the section applied to all religions and not merely in relation to one particular religion." (p.123)

"Non-preferential" sponsoring of or aiding religion is still "establishing" religion. In the 19th Century "establishment" was not restricted to sponsorship of or aid to one church or religion, although such sponsorship or support was of course referred to as establishment. It was also understood to include sponsorship or support of all churches, and was referred to as indiscriminate establishment. In "The State and its Relations with the Church" Gladstone stated that "The Australian colonies have most broadly avowed the principle of indiscriminate establishment". He described endowment of Roman Catholic chaplains and ministers as "state establishment of the Roman Catholic Church" and as part of this indiscriminate establishment (pp.269-273).

The meaning of establishment in the sense of one established church (as referred to in the United Kingdom case of *General Assembly of Free Church of Scotland v. Lord Overtoun* (1904) A.C. 515) is not the meaning of "establishing any religion" in s.116 of our Constitution. In this part of the Constitution, the framers obviously looked for guidance to the United States, not to the United Kingdom.

The purpose of the United States establishment clause was clearly to prevent the recognition of and assistance to religion which plagued European countries over many centuries. The religious wars of ancient times were repeated after the Middle Ages and into modern times. In the United Kingdom the struggle between the contending Catholic and Protestant factions, with the emergence of Presbyterians, Methodists, Quakers, Lollards and many other religious groups, was a bitter illustration of the attempts of religious factions to get the assistance of the state in propagating their views and if possible, suppressing their rivals. The history has a very important economic aspect. One of the dangers of subsidising religious institutions and granting them financial privileges (such as exemption from income tax, land and municipal rates, sales and other taxes) is that such institutions tend to become extremely wealthy, to aggrandize and to become states within a state. The corrective has often been a more or less violent seizure of the assets of the religious institutions, sometimes by the existing sovereign (as did Henry VIII), sometimes by revolutionary movements, which in many countries have had as one of their main objects the suppression of religious institutions and the seizure of their wealth.

Mr Justice Douglas refers to this in his partial dissent in *Tilton v. Richardson* 403 U.S. 672, 695-696 (1971):

"Much is made of the need for public aid to church schools in light of their pressing fiscal problems. Dr Eugene C. Blake of the Presbyterian Church, however, wrote in 1959:

'When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from the 52 percent corporate income tax, and that real property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future. That the growing wealth and property of the churches was partially responsible for revolutionary expropriations of church property in England in the sixteenth century, in France in the eighteenth century, in Italy in the nineteenth century, and in Mexico, Russia, Czechoslovakia and Hungary (to name a few examples) in the twentieth century, seems self-evident. A government with mounting tax problems cannot be expected to keep its hands off the wealth of a rich church forever. That such a revolution is always accompanied by anticlericalism and atheism should not be surprising.'

The mounting wealth of the churches makes ironic their incessant demands on the public treasury. I said in my dissent in *Walz v. Tax Comm'n*, 397 U.S. 664, 714:

'The religiously used real estate of the churches today constitutes a vast domain. See M. Larson & C. Lowell, The Churches: Their Riches, Revenues, and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. And the extent to which they are feeding from the public trough in a variety of forms is alarming.' "

In the United States, after deleterious consequences of aid to religion were observed in some of the states, the architects of its Constitution determined to prevent repetition there of the unfortunate experience of other countries by creating a 'wall of separation' between religion and State. (See J. Bryce, *The American Constitution* (1888) Vol. 3 pp.465-6).

The establishment clause was explained by Jefferson in the famous Danbury letter (to a group of Danbury Baptists):

"Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of government reach actions only, and not opinions, – I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation

> in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties."

The co-author of the establishment clause, James Madison, in explaining his veto to a bill of Congress, stated it was:

> "Because the bill in reserving a certain parcel of land of the United States for the use of the said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.' "

(J.D. Richardson, *Messages and Papers of the Presidents* (1900)). The Annotated U.S. Constitution states "... the theme of the writings of both [Madison and Jefferson] was that it was wrong to offer public support of any religion in particular or of religion in general" (1971) 3rd Edition, p.912.

This interpretation of the establishment clause was well settled and accepted judicially in the United States prior to the framing of the Australian Constitution.

In 1879, the Supreme Court of the United States in *Reynolds v. United States* 98 U.S. 145 (1879) in a unanimous judgment delivered by Chief Justice Waite, referred to the history of the establishment clause:

> "Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe." (p.162)

The judgment later quoted the above passage from the Danbury letter, and then continued:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured." (p.164)

Thus, an authoritative interpretation of the establishment clause had been given by the supreme tribunal in the United States shortly before the people of Australia were engaged in fashioning their own Constitution. Again in *Davis v. Beason* 133 U.S. 333, 342 (1890) the Court said:

> "The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended . . . to prohibit legislation for the *support of any religious tenets* or the modes of worship of any sect." (my emphasis)

Another case prior to 1900 to which we were referred was *Bradfield v. Roberts* decided in 1898 by the Court of Appeals (12 App.D.C. 453) and in 1899 by the United States Supreme Court (175 U.S. 291). The Court of Appeals decision was not delivered until after the Constitutional Conventions had ended, so that despite it's being before 1900 it had no influence on the framing of the Australian Constitution. The Court of Appeals held that the Providence Hospital, to which moneys were paid by the United States Government under contract, was a secular corporation (even though operated by Roman Catholics) and that the moneys were "not a subsidy or a gift of money, but compensation for actual services to be rendered" (p.471). They stressed that "the sole question for our determination is the power of Congress and the District Commissioners in the matter of the appropriation and contract involved in the case" (p.477). The Supreme Court also did not decide the scope of the establishment clause. As the Annotated Constitution of the United States (1972 edition) puts it:

> "The Court viewed the hospital as a secular institution so chartered by Congress and not as a religious or sectarian body, thus avoiding the constitutional issue" (p.917).

Although some United States' commentators such as Cooley favoured the "preferential" interpretation there is no doubt that the "separation" meaning of the clause as authoritatively declared in *Reynolds v. United States* was well-known to the framers of our Constitution. (See *Unto God and Caesar*, Richard Ely p.93, 95-6, 99-100). This separation interpretation has been consistently followed by the United States Supreme Court from *Reynolds'* case until now.

The effect of the United States decisions was properly stated by President Kennedy in 1961:

> "The Constitution clearly prohibits aid to the school, to parochial schools. I don't think there is any doubt of that.
>
> The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct. The Supreme Court made its decision in the Everson case by determining that the aid was to the child,

> not to the school. Aid to the school is – there isn't any room for debate on that subject. It is prohibited by the Constitution, and the Supreme Court has made that very clear. And therefore there would be no possibility of our recommending it." (See *Tilton v. Richardson* 403 U.S. 672, 690 (1971))

In *Everson v. Board of Education*, 330 U.S. 1, (1947) the case to which President Kennedy referred, the Supreme Court held that neither the United States nor (because of Amendment 14) any constituent State could provide financial aid to a religion or to all religions. The Court said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds v. United States*". (pp.15,16 my emphasis)

The minority opinions to which President Kennedy referred were even more emphatic. Mr Justice Jackson said:

> "There is no answer to the proposition, more fully expounded by Mr Justice Rutledge, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse." (pp.26,27)

Mr Justice Rutledge (with whom Justices Frankfurter,Jackson, and Burton agreed) said:

> "The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.
>
> 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for security 'the free exercise thereof'. 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other." (pp. 31,32)
>
> " 'Religion' has the same broad significance in the twin prohibition concerning 'an establishment'. The Amendment was not duplicitous. 'Religion' and 'establishment' were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." (p.33)

Chief Justice Warren in delivering the opinion of of the Court in *McGowan v. Maryland* 366 U.S. 420, 442 (1961) stated that the Supreme Court:

> "has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church."

In *Walz v. Tax Commission of the City of New York* 397 U.S. 664, 669 (1970) Chief Justice Burger delivering the opinion of the Court wrote:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favoured, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly

> proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

The Supreme Court has expressly rejected the proposition advanced in this case that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." (*Illinois ex rel. McCollum v. Board of Education* 333 U.S. 203, 211 (1948)).

Applicability of United States Authorities

In *D'Emden v. Pedder* (1904) 1 C.L.R. 91,112 Chief Justice Griffith, one of the framers of our Constitution said:

> "So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.
>
> There is, indeed, another consideration which gives additional weight to the authority of the United States decisions with regard to matters in which the two Constitutions are similar. We have already, in discussing the language of sec. 51 of the Constitution, referred to the inference to be drawn from the fact that a legislature has deliberately adopted in its legislation a form of words which has already received authoritative interpretation. We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that, sitting here, we are entitled to assume – what, after all, is a fact of public notoriety – that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, thought varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."

In *The Amalgamated Society of Engineers v. The Adelaide Steamship Company Ltd.* (1920) 28 C.L.R. 129, 146 the court held that the U.S. decisions were not standards to measure the respective rights of the Commonwealth and the States, because of "common sovereignty of all parts of the British Empire" and "the principle of responsible government". Those considerations are not present here, and we are not concerned with the respective rights of the Commonwealth and the States.

Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, 131 stated:

> "There is, therefore, full legal justification for adopting in Australia an interpretation of s.116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States."

The United States' decisions on the establishment clause should be followed. The arguments for departing from them (based on the trifles of differences in wording between the United States and the Australian establishment clauses) are hair-splitting, and not consistent with the broad approach which should be taken to constitutional guarantees of freedom. Even if the United States' decisions were set aside, the considerations to which I have referred show that the same interpretation is reached by applying ordinary constitutional principles of interpretation.

The purpose of our establishment clause is the same as that in the United States' Constitution. There does not seem to be any real doubt that if the establishment clause is construed in Australia as it is in the United States, (and if the Commonwealth's argument about the non-applicability of s.116 to financial appropriations and s.96 grants is rejected) then the challenged laws are unconstitutional. Section 116 of the Constitution does not assert or deny the value of religion (including religious teaching). It secures its free exercise, but denies that the Commonwealth can support religion in any way whatsoever. The Commonwealth cannot be concerned with religious teaching – that is entirely private. Section 116 recognises that an essential condition of religious liberty is that religion be unaided by the Commonwealth.

The argument that the aid to church schools is only of minor assistance to the religious aspect of the schools and its major impact is to aid the secular aspects is no answer to the plaintiffs' challenge. In his famous *Virginia Memorial and Remonstrance against Religious Assessment*, Madison tellingly explained "That the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (in *The Mind of the Founders*, edited by Marvin Meyers, 1973, p.10)

The fact is that under the Commonwealth laws vast sums of money are being expended for the support of church schools. The result of the capital grants Acts is that great and increasing sums are being given to churches to acquire property, which can then lawfully be used for religious purposes apart altogether from schooling. Although the *States Grants (Schools Assistance) Act* 1978 forbids approval of projects (for grants) "if the sole or one of the principal objects" is "to provide facilities for use, wholly or principally, for or

in relation to religious worship" (s.15), this does not prevent a grant for a project as long as religious worship is not the sole or principal object, or one of the principal objects and the Act does not prevent subsequent use of the property for any purpose, even exclusive use for religious worship. The evidence showed that two Catholic parish school buildings, at Churchill and Corio in Victoria although not used wholly or principally for or in relation to religious worship, have been used for religious purposes (apart from schooling). Eighty per cent of the cost of the Catholic primary school building at Churchill in the Latrobe Valley, in Victoria was contributed by the payment of Commonwealth grants. The building is also used as the local parish church. A nearby street sign indicates that the building is a Catholic church. $127,000 of the $180,000 cost of construction of the parish primary school in Corio outside Geelong, was provided out of Commonwealth grants. Both these buildings have been used for celebration of Mass for the local parish each Sunday, and for Confessions each Saturday, and occasionally for other religious services. There is nothing in the challenged Acts to restrict similar use of other property obtained with moneys given to the churches pursuant to these Acts. The effect of the Grants Acts is that the wealth of the churches is increased annually by many millions of dollars of taxpayers' moneys. They have the effect of establishing of religion. As Justice Douglas observed "In common understanding there is no surer way of 'establishing' an institution than by financing it" (*Wheeler v. Barrera* 417 U.S. 402, 430 (1974)).

Section 80 (trial by jury) and s.116 are among the very few guarantees of freedom in the Constitution. In *R. v. Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 C.L.R. 556, Justices Dixon and Evatt asserted that this Court's reading of s.80 made a mockery of the Constitution (p.581-2). A reading of s.116 that the prohibition against "any law for establishing any religion" does not prohibit a law which sponsors or supports religions, but prohibits only laws for the setting up of a national church or religion, or alternatively prohibits only preferential sponsorship or support of one or more religions, makes a mockery of s.116. Jefferson warned against this tendency. "Our peculiar security is the possession of a written Constitution. Let us not make it a blank paper by construction" (Jefferson Writings 506 (Washington ed. 1859)). We should heed his warning.

Standing

The defendants challenge the standing of each of the plaintiffs to attack the validity of the legislation. There are three classes of plaintiffs: the Attorney-General of Victoria who sues at the relation of a number of persons, a group of taxpayers of the Commonwealth who are resident in various States and in the Australian Capital Territory and a group of persons who are taxpayers and parents of children at government schools. I am not satisfied that any of these lack standing.

United Kingdom cases on standing are not in point. That country has a unitary system with no constitutional guarantees like our s.116.

It is a traditional duty of the Attorney-General of Australia to defend the validity of Acts. It would be incongruous and unrealistic to hold that only the Attorney-General could challenge the validity of an Act. To require a person who is not and will not be affected by the coercive operation of an Act to obtain the fiat of the Attorney-General of Australia or of a State would put enforcement of constitutional guarantees at the mercy of political pressures exercisable through parliaments, although the purpose of the constitutional guarantees was to provide certain protections, even against Parliaments. A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and, in my opinion, does not, depend upon obtaining an Attorney-General's consent. Any one of the people of the Commonwealth has the standing to proceed in the courts to secure the observance of Constitutional guarantees. Objections to wide standing have no merit. Experience in other countries, especially the United States, has shown that the "floodgates" argument is baseless, and that procedures are available to deal with frivolous challenges.

The United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 204 (1962) said:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."

The conduct of the case by the plaintiffs and their presentation of factual and legal material has taken the question beyond assurance to actual demonstration of that "concrete adverseness which sharpens the presentation of the issues" referred to in *Baker v. Carr*.

The challenged Acts contravene s.116 of the Constitution. As the majority holds otherwise, there is no point in my deciding whether some provisions are severable and valid, or whether some provisions can be read down so that they do not contravene s.116. Judgment should be for the plaintiffs.

AICKIN J. I have had the advantage of reading the reasons for judgment prepared by my brother Gibbs and those prepared by my brother Mason. I am in agreement with those reasons and there is nothing that I can usefully add.

I agree that the action should be dismissed.

WILSON J. In this case the Attorney-General for the State of Victoria sues upon the relation of twenty-seven persons each of whom is a resident of the State of Victoria and a taxpayer of the Commonwealth of Australia. Twelve of them are each described also as a parent of children who attend schools conducted by the State of Victoria, and three of them are each described as a teacher in a school conducted by the State of Victoria. A number of other persons sue as plaintiffs in their own right, asserting various capacities which include the following:

(a) residents of the State of Victoria and taxpayers of the Commonwealth of Australia, including some who are also the parents of children who attend schools conducted by the State of Victoria;

(b) residents of the Australian Capital Territory and taxpayers of the Commonwealth of Australia, including one who is a parent of children attending a school conducted in the Australian Capital Territory by the Commnwealth of Australia;

(c) residents of the State of New South Wales and taxpayers of the Commonwealth of Australia, including some who are parents of children attending schools conducted by the State of New South Wales;

(d) residents of the State of Tasmania and taxpayers of the Commonwealth of Australia.

The defendants are the Commonwealth and three Ministers of the Crown in right of the Commonwealth, and the National Council of Independent Schools and Reverend Father Martin both of whom are sued as representing the non-government schools in the Commonwealth of Australia.

The plaintiffs assert, and it is admitted by the defendants, that on the dates specified in 1972 and 1973 each of the Attorneys-General of the Commonwealth of Australia, New South Wales, Tasmania, Western Australia, South Australia and Queensland respectively refused to grant a fiat in relation to proceedings similar to the present case.

The defendants have challenged the standing of each of the plaintiffs to invoke the jurisidiction of the Court, and I will examine this aspect of the matter when the central issues in the case have been considered.

The Attorneys-General of New South Wales, Queensland and Tasmania, the State of Victoria, South Australia and Western Australia, and the Northern

Territory have intervened in the proceedings in support of the validity of the legislation. They also support the standing of the Attorney-General of Victoria to bring the action.

Broadly speaking, the plaintiffs' claim is that the legislation by which the Commonwealth has provided financial assistance to non-government schools in each of the States, the Australian Capital Territory and the Northern Territory is beyond the power of the Parliament and invalid. The statutes under challenge include the *States Grants (Schools) Acts* that were enacted between 1972 and 1976, the *States Grants (Schools Assistance) Act* and amending Acts passed each year from 1976 to 1979, the *Schools Commission Act*, 1973, the *Independent Schools (Loans Guarantee) Act*, 1969, and each *Appropriation Act* so far as it provides for the payment of moneys to, for or on behalf of non-government schools in the Australian Capital Territory and the Northern Territory.

The submissions of the plaintiffs may be stated summarily in the form of propositions as follows:

1. Section 116 of the Constitution applies so as to limit every law-making power of the Commonwealth. In providing that "the Commonwealth shall not make any law for establishing any religion", the section prevents the Commonwealth Parliament from "making any law which provides any recognition or aid or support to one or more religions or to religion generally".

2. That the States Grants legislation is invalid because it infringes s.116 insofar as it provides grants for the funding of religious schools.

3. In any event, the States Grants legislation is beyond power in that it is not within the authority conferred on the Parliament by s.96 of the Constitution.

4. Since s.116 controls laws enacted pursuant to the power conferred by sections 81, 83, and 122, the general *Appropriation Acts* of the Commonwealth to the extent that they appropriate money for spending on religious schools in the Territories, and the *Independent Schools (Loans Guarantee) Act*, 1969, are invalid.

5. The laws referred to together with the *Schools Commission Act*, 1973, and the facts surrounding their administration establish an undue involvement of the Commonwealth in the affairs of religion, contrary to s.116, and the said laws are therefore invalid.

The Legislation

At this point it is convenient to indicate the relevant features of the impugned legislation. The States Grants legislation will be sufficiently exposed if I examine the *States Grants (Schools Assistance) Act* 1978. Its provisions include the following:

> "3.(1) In this Act, unless the contrary intention appears –
>
> "approved authority", in relation to an approved school system or in relation to a non-government school, means such person or body as the Minister declares to be the approved authority of that school system or of that school, as the case may be, for the purposes of this Act;
>
> "approved school system" means a school system in a State, or in a part of a State, that consists of non-government schools and that the Minister declares to be an approved school system for the purposes of this Act;
>
> "approved service and development activities" means –
>
> (a) in-service teacher training;
>
> (b) inquiries into the feasibility of providing support services for government schools and non-government schools in a State, or the planning of such support services; or
>
> (c) activities the purpose of which is to improve communication and understanding between teachers at government schools and teachers at non-government schools in a State, other persons employed at, or associated with the administration of, those schools, and students, and parents of students, at, and other members of the community interested in education at, those schools;
>
> "disadvantaged school" means –
>
> (a) a government school in a State that the State Education Minister for the State notifies the Commonwealth Education Minister, under sub-section 4 (1), is a school that should, in the opinion of the State Education Minister, be treated as a disadvantaged school for the purposes of this Act; or
>
> (b) a non-government school in a State that the Minister declares, under sub-section 4 (2), to be a disadvantaged school for the purposes of this Act;

"education centre" means a body corporate, or a body of persons that the Minister is satisfied will, during the year to which this Act applies, become a body corporate –

(a) the members, or a majority of the members, of the governing body of which are persons employed as teachers at government schools or non-government schools;

(b) the sole or principal object of which is to improve the professional competence of teachers by methods that include the provision of in-service teacher training; and

(c) which is not conducted for the profit, direct or indirect, of an individual or individuals;

"government school" means a school in a State that is conducted, or proposed to be conducted, by or on behalf of the Government of the State;

"in-service teacher training" means teacher training of persons in employment as teachers at government schools or non-government schools;

"migrant education" means the provision of special educational programs and facilities, and the adaptation of educational programs and facilities, for the purpose of meeting the special educational needs of migrant children and the children of migrants and, in particular, for the purpose of teaching the English language to such children and also providing education for such children and other children that takes account of the various cultures of peoples in countries from which persons have migrated to Australia;

"multicultural education" means the provision of special educational programs and facilities for the purpose of teaching languages (other than the English language) spoken in overseas countries to students receiving primary education or secondary education at government schools or non-government schools and also providing education for such students that takes account of the various cultures of peoples in overseas countries;

"non-government school" means a school in a State that is not conducted, or proposed to be conducted, by or on behalf of the Government of the State, but does not include a school conducted, or proposed to be conducted, for the profit, direct or indirect, of an individual or individuals;

"primary education", in relation to a non-government school in a State, means education of a kind similar to that provided for students at government primary schools in the State;

"residential institution" means an institution or home in a State that (whether or not it is an institution or home at which primary or secondary education is also provided) provides residential care for children and is conducted for welfare, correctional or similar purposes, being an institution or home that the Commonwealth Education Minister, having regard to any advice furnished to him by the State Education Minister for the State in relation to the institution or home, declares to be a residential institution for the purpose of this Act;

"school" includes a proposed school, or an institution or proposed institution similar to a school, but does not include –

(a) a school or institution at which education is provided at a standard (however described) that is pre-school standard only or a proposed school or institution at which it is proposed that education be provided at a standard (however described) that is pre-school standard only; or

(b) where the State Education Minister for a State notifies the Commonwealth Education Minister that a specified school or institution in the State is not recognized by the State Education Minister as a school and the Commonwealth Education Minister does not approve the school or institution as a school for the purposes of this Act – that school or institution;

"secondary education", in relation to a non-government school in a State, means education of a kind similar to that provided for students at government secondary schools in the State;

"special school" means a school, or proposed school, in a State (whether or not it is a school or institution at which primary education or secondary education is provided or proposed to be provided) –

(a) at which special education is provided, or proposed to be provided, for handicapped children; and

(b) that the State Education Minister for the State notifies the Commonwealth Education Minister should, in the opinion of the State Education Minister, be treated as a special school for the purposes of this Act,

or, in the case of such a school at which special education for handicapped children, and also education other than special education for handicapped children, are provided or proposed to be provided, that school in so far as it provides or proposes to provide special education for handicapped children;

"systemic school" means a non-government primary school, or a non-government secondary school, that is included in an approved school system and that the Minister declares to be a systemic school for the purposes of this Act.

Part II (ss.5-14) deals with financial assistance with respect to various programs affecting government schools, including building and equipment projects, recurrent expenditure, migrant education, disadvantaged and special schools. Part III (ss.15-29) covers similar areas in relation to non-government schools. Section 15 provides for the approval by the Minister of building projects and equipment projects in connection with both primary and secondary schools in a State. A project will not be approved if the sole or principal object, or one of the principal objects, of the project is to provide facilities for use, wholly or principally, for or in relation to religious worship. Section 16 empowers the Minister to authorise the payment to a State, by way of financial assistance to the State, of such amounts as he determines in respect of expenditure in relation to an approved project, but subject to the limits imposed by s.17.

Sections 18 and 19 deal respectively with approved school systems and non-systemic schools. In each case, the Minister may determine from time to time the level at which financial assistance is to be provided for the purpose of meeting recurrent expenditure of the system or the school, having regard to the need for such assistance. There are six levels prescribed in Schedule 6, representing different levels of need, indicating an amount referable to each level which when multiplied by the number of students involved yields the sum which the Minister is authorised by s.18(8) and s.19(8) respectively to pay to a State by way of financial assistance to that State. Section 20 fixes an additional maximum sum which the Minister may disburse to meet a need in either category of school for short-term emergency assistance. Section 18(9) stipulates the conditions on which the financial assistance is granted, and reads as follows:

"(9) Financial assistance is granted to a State under this section in respect of recurrent expenditure of an approved school system in the State on the conditions that –

(a) subject to paragraph (b), the State will, without undue delay, pay to the approved authority of the school system an amount equal to each amount paid to the State under this section in relation to the approved school system, and, in making the payment, will describe the amount paid to the approved authority as a payment made out of moneys provided to the State by the Commonwealth under this section; and

(b) the State will not make a payment to the approved authority under this section unless the approved authority, before or at the time of accepting the first payment under this section, has agreed or agrees with the State to be bound by the following conditions:

(i) the approved authority will ensure that an amount equal to the sum of the amounts paid to the approved authority under this section is applied, according to the respective needs of systemic schools in the school system, for the purpose of meeting recurrent expenditure, in respect of the year to which this Act applies, of those schools, and of the approved authority in respect of those schools, in such proportions as the Minister determines, and, in particular, will ensure that such part of that amount as is not less than the amount determined by the Minister under paragraph (8)(c) in relation to the school system is applied for the purpose of meeting recurrent expenditure, in respect of the year to which this Act applies, in connection with such of those schools as are schools in need of short-term emergency assistance;

(ii) the approved authority will cause to be furnished to the Minister (not later than 30 June 1980 or such later date as the Minister approves) –

(A) a certificate by a qualified accountant to the effect that he has satisfied himself that the condition specified in sub-paragraph (i) has been fulfilled; and

(B) a statement, in writing, that contains such information in respect of recurrent expenditure of the systemic schools in the school system, and of the approved authority in respect of those schools, and such other financial and statistical information in respect of those schools and the approved authority, as is required by the Minister to be so furnished;

(iii) if the approved authority does not fulfil a condition specified in sub-paragraph (i) or (ii), the authority will, if the Minister so determines, repay to the State such amount (not being an amount greater than the sum of the amounts paid to the approved authority under this section) as the Minister determines should be repaid by the approved authority."

Section 19(9) is in similar terms.

The remaining sections in Part III confer authority on the Minister, subject to conditions and procedures similar to those I have outlined, to grant financial assistance to the States, subject to prescribed maxima, to be applied in connection with migrant education, disadvantaged schools and special schools.

Section 29 provides:

"29. Financial assistance granted to a State under a section contained in this Part is granted on the additional conditions that –

(a) if an amount that the approved authority of a non-government school or an approved school system is liable to repay to the State, under a condition of an agreement entered into in accordance with the section, is repaid by the authority to the State, or is recovered by the State from the authority, the State will pay to the Commonwealth an amount equal to that amount; and

(b) if the State does not fulfil a condition specified in the section under which the financial assistance is granted, the State will, if the Minister so determines, repay to the Commonwealth such amount (not being an amount greater than the sum of the amounts of financial assistance paid to the State under that section in respect of that non-government school or approved school system) as the Minister specifies in the determination as the amount that should be repaid by the State."

Part IV (ss.30-46) is headed "Joint Government and Non-Government Schools Programs". It provides for financial assistance in respect of expenditure in connection with multicultural education, primary or secondary education in disadvantaged country areas, education of children residing in residential institutions, approved service and development activities, inter-school transfers of teachers, approved education centres, and approved special projects.

Section 55 authorises the Minister to delegate to the Schools Commission, or to a full-time member, or to full-time members of the Commission, any of his powers under the Act, subject to specified exceptions.

The *Schools Commission Act* 1973, sets up the Commission, with the functions set out in s.13. That section provides as follows:

"(1) In the performance of its functions, the Commission shall consult and co-operate with representatives of the States, with authorities in the Australian Capital Territory and the Northern Territory responsible for primary or secondary education in either or both of those Territories and with persons, bodies and authorities conducting non-government schools in Australia, and may consult with such other persons, bodies and authorities as the Commission thinks necessary.

(2) The functions of the Commission are to inquire into, and to furnish information and advice to the Minister with respect to, the following matters:–

(a) The establishing of acceptable standards for buildings, equipment, teaching and other staff and other facilities at government and non-government primary and secondary schools in Australia, and means of attaining and maintaining those standards;

(b) The needs of such schools in respect of buildings, equipment, staff and other facilities, and the respective priorities to be given to the satisfying of those various needs;

(c) Matters in connexion with the grant by Australia of financial assistance to the States for and in respect of schools and school systems and to schools in the Australian Capital Territory and the Northern Territory, including matters relevant to the necessity for financial assistance to be so granted by Australia, the conditions upon which financial assistance should be so granted and the amount and allocation of any financial assistance so granted; and

(d) Any other matter relating to primary or secondary education in Australia, or to Australian schools, that may be referred to the Commission by the Minister or which the Commission considers to be a matter that should be inquired into by the Commission.

(3) In addition to the functions of the Commission under sub-section (2), the Commission shall have such other functions as are conferred on it, either expressly or by implication, by or under any other Act.

(4) In the exercise of its functions, the Commission shall have regard to such matters as are relevant, including the need for improving primary and secondary educational facilities in Australia and of providing increased and equal opportunities for education in government and non-government schools in Australia and the need for ensuring that the facilities provided in all schools in Australia, whether government or non-government, are of the highest standard, and, in particular, shall have regard to –

(a) the primary obligation, in relation to education, for governments to provide and maintain government school systems that are of the highest standard and are open, without fees or religious tests, to all children;

(b) the prior right of parents to choose whether their children are educated at a government school or a non-government school;

(c) the educational needs of handicapped children and handicapped young persons;

(d) the needs of disadvantaged schools and of students at disadvantaged schools, and of other students suffering disadvantages in relation to education for social, economic, ethnic, geographic, cultural, lingual or similar reasons;

(e) the need to encourage diversity and innovation in education in schools and in the curricula and teaching methods of schools;

(f) the need to stimulate and encourage public and private interest in, and support for, improvements in primary and secondary education and in schools and school systems;

(g) the desirability of providing special educational opportunities for students who have demonstrated their ability in a particular field of studies, including scientific, literary, artistic or musical studies; and

(h) the need, in relation to primary and secondary education and in schools and school systems, to promote the economic use of resources.

(5) For the purpose of the performance of its functions, the Commission may undertake, or cause to be undertaken, such research as it thinks necessary into matters that relate to the functions of the Commission."

The *Independent Schools (Loans Guarantee) Act*, 1969, empowers the Treasurer, on behalf of the Commonwealth, to guarantee the repayment by an independent school of moneys borrowed by it for the purposes of approved capital expenditure. An independent school is defined to mean –

"a school (in the Australian Capital Territory or the Northern Territory of Australia) at which students are given education at a primary or secondary level or both, not being a school –

(a) conducted by, or on behalf of, the Commonwealth; or

(b) conducted for the profit, direct or indirect, of an individual or individuals".

The Facts

It is desirable to refer briefly to the facts upon which the plaintiffs rely to demonstrate that the legislation offends s.116. It is apparent from the statutory provisions to which I have referred that financial assistance is provided, inter alia, to non-government schools. There is no reference to religion or to religious schools. In these circumstances the defendants argue that any reference to the facts is irrelevant because the validity of the statutes is to be determined according to their terms. On the other hand, some understanding of the operation and effect of the legislation is essential to a proper consideration of the submissions of the plaintiffs. I propose to confine myself to a description of the relevant aspects of the educational scene in Australia. These are matters

largely of public record, not the subject of any dispute between the parties. As at present advised, it will not be necessary for me to enter the labyrinth of contested facts.

From colonial times colonial and State Governments in Australia have been responsible for primary and secondary education within their bounds. In every State that education is provided within a system of government and non-government schools. Instruction is provided without charge in the former system, but tuition fees are payable at non-government schools. Attendance at one type of school or the other is compulsory.

Although it varies from State to State, the legislation in each State provides for a degree of supervision by the State of the content and standards of the secular education provided by a non-government school. To be recognised within the educational system a school must be registered or accredited as a school. The plaintiffs do not suggest that the secular education provided by non-government schools is inadequate or in any way inferior to that provided by government schools.

A similar situation obtains in the Territories.

In 1976, approximately 2.9 million children were receiving primary or secondary education in Australia. Of these, approximately 600,000 children, or more than 20%, were attending non-government schools. In the same year, there were a total of 2002 non-government schools which received financial assistance from the Commonwealth under the legislation in question, of which 1965 were schools which acknowledged some religious character either by way of affiliation with a religious body or simply as Christian schools. Of these, 1657 schools were conducted by the Roman Catholic Church. If it matters, it is clear that most of the children attending a school belonging to a particular religion or religious denomination come from families which profess that particular form of religious faith.

The plaintiffs place great reliance on the extent to which the "religious" non-government schools use the school as an instrument in the mission of the church to which they belong, that mission being seen essentially in terms of instruction and nurture of the faith. There is no reason to doubt that this is so in the great majority of cases, although it is not suggested that the pattern is wholly uniform and without exception.

Commonwealth aid to non-government schools in the States began in 1964 with capital grants for the construction and equipment of science laboratories. In 1968 attention was extended to secondary school libraries, and assistance with recurrent expenditure was commenced in 1969. The total amount of assistance has grown each year, and by 1979 the total exceeded $600m. The

following schedule records the grants made by the Commonwealth to the States to assist both government and non-government schools in the period from 1964 to 1979.

COMMONWEALTH GRANTS IN RESPECT OF SCHOOLS

	RECURRENT PROGRAMS				CAPITAL PROGRAMS			
	('000)							
Year	Govt Schools	Non Govt Schools	Joint	Total	Govt Schools	Non Govt Schools	Joint	Total
1964/65	–	–	–	–	7,238	2,667	–	9,905
65/66	–	–	–	–	6,968	2,667	–	9,635
66/67	–	–	–	–	7,496	2,667	–	10,163
67/68	–	–	–	–	7,250	5,337	–	12,587
68/69	–	–	–	–	8,128	5,337	–	13,465
69/70	–	12,177	–	12,177	12,098	8,340	–	20,438
70/71	–	24,253	–	24,253	18,064	8,255	–	26,319
71/72	–	29,954	–	29,954	20,622	6,642	–	27,264
72/73	–	40,979	–	40,979	26,243	6,776	–	33,019
73/74	26,749	55,177	3,735	85,661	60,990	14,986	–	75,976
74/75	117,876	101,711	14,992	234,579	170,016	28,393	959	199,368
75/76	186,663	123,633	21,589	331,885	113,786	28,749	1096	143,631
76/77	225,767	171,666	24,325	421,758	127,214	19,935	617	147,766
77/78	235,481	191,347	28,739	455,567	151,227	31,960	201	183,388
78/79	231,859	212,325	26,037	470,221	140,533	41,336	17	181,886

Apart from providing a degree of administrative oversight of non-government schools, State Governments have themselves contributed financial assistance, by way of interest subsidies on capital expenditure, per capita grants in respect of recurrent expenditure and miscellaneous items. The following table gives an indication of estimated public expenditure on government and non-government schools in Australia for the year 1977/78:

ESTIMATED PUBLIC EXPENDITURE ON SCHOOLS, AUSTRALIA 1977/78(a)

	RECURRENT		CAPITAL	
	Total	Per Student	Total	Per Student
	$m.	$	$m.	$
SCHOOLS IN THE STATES				
State government funds				
– for government schools	2,440.3	1,060	300.2	130
– for non-government schools (b)	128.5	209	–	–
Commonwealth funds				
– for government schools	234.4	102	150.6	65
– for non-government schools	190.4	310	31.8	52
– for joint programs (c)	28.6	10	0.2	–
SCHOOLS IN NORTHERN TERRITORY AND AUSTRALIAN CAPITAL TERRITORY				
Commonwealth funds				
– for government schools	103.3	1,665	33.4	539
– for non-government schools	11.5	673	3.9	231
	3,137.0	1,047 per student	520.1	174 per student

(a) Excludes expenditure on student assistance, school transport, payments of interest on Commonwealth loans and payroll tax. Commonwealth figures include general purpose and special purpose programs for which funds are made available separately to the sectors (e.g. Disadvantaged Schools Program, Migrant and Special Education Programs).

(b) Interest subsidies are included in recurrent expenditure figures.

(c) Comprises Services and Development, Disadvantaged Country Areas and Special Project programs in which both government and non-government schools may participate.

The defendant Schools make the point that notwithstanding the growth in public expenditure on non-government schools, those schools are still required to find substantial moneys by way of tuition fees and donations from private sources, as is shown by the following schedule, which records the sources of income of non-government schools per student for the years 1974 and 1976:

	1974			1976		
	Primary schools	Mixed schools	Secondary schools	Primary schools	Mixed schools	Secondary schools
	$	$	$	$	$	$
CATHOLIC SYSTEMIC						
Tuition fees	56	63	132	62	155	176
Value of contributed services (b)	182	234	369	134	157	167
Other private (c)	51	27	70	57	50	51
Total private	289	324	571	253	362	394
Commonwealth recurrent grants	164	188	267	274	347	417
State recurrent grants (d)	104	112	115	131	182	231
Capital grants	30	30	75	32	32	56
Total income	587	654	1,028	690	923	1,098
CATHOLIC NON-SYSTEMIC						
Tuition fees	131	271	213	200	320	239
Value of contributed services (b)	158	171	235	149	153	204
Other private (c)	29	72	80	175	64	79
Total private	318	514	528	524	537	522
Commonwealth recurrent grants	135	197	220	237	335	398
State recurrent grants (d)	99	119	144	122	194	222
Capital grants	–	28	90	7	43	42
Total Income	552	858	982	890	1,109	1,184

	1974			1976		
	Primary schools	Mixed schools	Secondary schools	Primary schools	Mixed schools	Secondary schools
	$	$	$	$	$	$
OTHER SCHOOLS						
Tuition fees	438	1,179	1,070	443	1,204	1,006
Value of contributed services (b)	122	–	–	139	–	64
Other private (c)	167	140	234	144	126	224
Total private	727	1,319	1,304	726	1,330	1,294
Commonwealth recurrent grants	102	140	162	176	158	233
State recurrent grants (d)	95	119	134	131	200	229
Capital grants	25	32	53	38	29	41
Total income	949	1,610	1,653	1,071	1,717	1,797

(a) Excludes income relating to boarding facilities.

(b) Notional salaries of teachers and other professional staff (based on average salaries paid to teachers in government schools) less actual salaries paid.

(c) Comprises all cash income from private sources other than tuition fees, including cash income for capital purposes.

(d) Includes interest subsidies.

Another aspect of the facts upon which the plaintiffs rely is the question of ownership of non-government schools. While there is considerable diversity in the style of proprietorship, ranging from independent statutory corporations to a vesting of beneficial interests in the local parish, it suffices to note that in many cases the sponsoring religious body is both the legal and beneficial owner of the school.

In the Northern Territory (prior to self-government in 1978) and in the Australian Capital Territory Commonwealth funding takes the form of direct grants to schools and school systems by the Department of Education from moneys appropriated for that purpose by the general *Appropriation Acts*.

It is against the foregoing background of law and fact that I now address myself to the submissions of the plaintiffs.

Section 116

This section reads as follows:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

It will be noticed that the section appears in Chapter V of the Constitution, dealing with the States. It is suggested by the Commonwealth that that fact should control its construction as, for example, that it was intended as a guarantee to the States of non-interference rather than the assurance of a personal freedom. However, the explanation for its presence in Chapter V may plausibly be found in the turbulent history of the clause in the discussions leading up to federation, including the fact that at one stage the draft proposal was in form directed to the States. Be that as it may, I do not attach particular significance to its location in the Constitution.

Before I deal with the meaning of the relevant clause in the section, I shall examine the competing submissions concerning the reach of the section. The plaintiffs argue that s.116 is a singular provision in the Constitution, standing alone as a formal guarantee of a personal freedom, of the type found in the Bill of Rights in the Constitution of the United States of America. As such, it controls every law-making power vested in the Parliament of the Commonwealth, whether that power is to be found in ss.51, 81, 96, or 122. Reliance is placed upon the dictum of Latham C.J. in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, at 123:

> "Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made. It is an overriding provision. It does not compete with other provisions of the Constitution so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws."

(cf. also McTiernan J., at p.156.)

The defendants contest this proposition, particularly so far as concerns laws passed pursuant to sections 81 and 96, and rely on the fiscal nature of the laws contemplated by both these sections, and the non-coercive character of laws related to the latter section.

In my opinion, the plaintiffs' argument concerning the application of s.116 carries great weight. The section is clear and emphatic in its command, opening with the words "The Commonwealth shall not make any law . . . ". Quite clearly, it applies to laws enacted pursuant to the powers conferred by section

51, including pl.(xxiiiA) which refers, inter alia, to benefits to students. I would expect it also to control the exercise of power pursuant to section 122 relating to laws for the government of any territory, and this was the view taken by the full bench of this Court in *Teori Tau v. The Commonwealth* (1969) 119 C.L.R. 564, at 570. The real difficulty arises in the case of fiscal laws of the Commonwealth, having their source of power in ss.81 or 96. With respect to the latter section, the defendants argue that the reliance of the plaintiffs on the statements of Latham C.J. and McTiernan J. in *Jehovah's Witnesses* is misplaced because those statements were obiter dicta, and insofar as they could support the proposition that s.96 is subject to s.116 they are inconsistent with other decisions of the Court upon the effect of s.96. It is said that in *Victoria v. The Commonwealth (the Federal Aid Roads case)* (1926) 38 C.L.R. 399 the Court decided that a grant of financial assistance to the States made by virtue of the provisions of s.96 is "not affected by those of s.99 or any other provisions of the Constitution", and that this formulation was adopted by Latham C.J. and Starke J. in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735, at 763 and 775 respectively. Despite the breadth of the dictum cited, these cases were concerned with the validity of a s.96 law the terms and conditions of which related to a subject matter which was not within the legislative power of the Commonwealth, and also with the relevance to such a law of the express prohibitions relating to discrimination and preference found in s.51(ii) and s.99 respectively. There is no doubt that they establish the proposition that the power conferred by s.96 is well exercised although "the object is outside the powers of the Commonwealth" (per Dixon C.J. in *Victoria v. The Commonwealth (the second Uniform Tax case)* 99 C.L.R. 575, at 606. But save as to s.51(ii) and s.99, the focus was upon purposes in respect of which the Commonwealth lacked a positive power, not purposes the pursuit of which by the Commonwealth was expressly forbidden; in the case of the prohibitory character of s.51(ii) and s.99, the impact of these provisions is avoided by the express words of s.96, the very terms of which contemplate preference and discrimination as between States.

In *P.J. Magennis Pty. Ltd. v. The Commonwealth* (1949) 80 C.L.R. 382 this Court held to be invalid a law which approved an agreement between the Commonwealth and the State of New South Wales relating to war service land settlement. The arrangement was that the State would acquire land for the purpose of the scheme at a value to be determined by reference to a date some years earlier. It was acknowledged that the land would have increased substantially in value in the interim period. A majority of the members of the Court held the law to contravene s.51(xxxi) because it failed to provide just terms for the acquisition of the property. At p.403 the Chief Justice, Sir John Latham, dismissed summarily an argument based on s.96, saying:

> " . . . there is no substance in the objection that the Act is an Act giving financial assistance to States (Constitution, s.96), and is therefore not a law with respect to the acquisition of property".

Subsequent to the decision in *Magennis* the New South Wales law was amended to remove any dependence upon an agreement with the Commonwealth, and an acquisition pursuant to the amended Act withstood challenge (*Pye v. Renshaw* (1951) 84 C.L.R. 58). Notwithstanding the thrust of the dicta appearing in the judgment of the Court in the last-mentioned case (p.83), in my respectful opinion Magennis remains a persuasive analogy.

The salient feature, for present purposes, of a s.96 law is that through the exercise of the power to impose conditions to a grant of financial assistance the Commonwealth Parliament may pursue a particular purpose. It is not to the point that a State may refuse to accept the assistance because it is unwilling to comply with the conditions. The fact that the law may fail of its purpose does not deny the characterisation of the law in terms of that purpose.

In the case of s.81, the defendants say that Appropriation Acts are not affected by s.116. They are financial, not regulative, laws. Reliance is placed upon passages in the reasons for judgment of Stephen J. and Jacobs J. in *Victoria v. The Commonwealth and Hayden (the A.A.P. case)* (1975) 134 C.L.R. at 386 and 411 respectively. So much may readily be conceded, yet just as in the *A.A.P. case* the "purpose" of the appropriation was to finance an executive activity of the Commonwealth for which there was no constitutional authority, so here an appropriation may provide the occasion for review: cf. Mason J., *A.A.P. case*, pp.402-404.

Let me assume, for the purpose of the argument, that the Parliament sought to establish a religion, and proceeded to enact laws pursuant to s.96 and provide funds pursuant to s.81 as part of a Scheme to achieve that result. As at present advised, and with great respect to those who think differently, I am unable to see why those laws would not offend s.116. However, for reasons which will appear, this view is not determinative of the answer to the present case.

I come now to the question of the proper construction of the first clause of s.116. The plaintiffs submit that the purpose of the section is to achieve religious freedom and that the establishment clause contributes to this purpose by prohibiting the Commonwealth from making any law which provides any recognition or aid or support to one or more religions or to religion generally. They draw support for their contention from the historical events in the colonies prior to federation which they say resulted by the end of the 19th century in the disestablishment of religion. They draw a close parallel between s.116 and the First Amendment of the Constitution of the United States and draw from the history of the Supreme Court's interpretation of the establishment clause the concept of a strict separation of church and state. In their submission, the words used in the section bear out their contention. They should be given

a broad meaning. The word "for" is to the same effect as "in respect of", words which are of the widest import, and reference is made to *Lamshed v. Lake* (1957-58) 99 C.L.R. 132 at 141. "Establishing any religion" encompasses any law which has a tendency or takes a step towards establishment, and this includes any form of endowment or support to any one or more religions.

All of these submissions have been contested strongly by the defendants and the intervening States. The issues have been fought out at great length, both in writing and by oral submissions. I think it impossible, and therefore I hope unnecessary, if this judgment is to be kept within reasonable dimensions, for me to reflect accurately the time that has been consumed in their consideration. I propose, therefore, to proceed with some circumspection to indicate the conclusions to which I have come.

The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

This clause has assumed an honoured place in the American Bill of Rights. The history surrounding its interpretation and its application to the States through the XIVth Amendment is a very striking one, so much so that even a close correspondence between its words and those of s.116 would not of itself justify this Court in adopting the same construction of the provisions as has developed in the United States. I respectfully endorse what Gibbs J. said recently in *Australian Conservation Foundation Incorporated v. Commonwealth of Australia* (1979-80) 28 A.L.R. 257 at 270:

> "Although we naturally regard the decisions of the Supreme Court of the United States with the greatest respect, it must never be forgotten that they are often given against a different constitutional, legal and social background from that which exists in Australia".

In my opinion, these words of caution have direct application to the present case.

Cf. also per Barwick C.J. in *Attorney-General of the Commonwealth (Ex rel. McKinlay) v. The Commonwealth* (1975) 135 C.L.R. 1 at 24.

In any event, there is here a divergence both in word and context. The context is different in that the provision does not form part of a Bill of Rights. The plaintiffs' claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force when one must add "but only as

against the Commonwealth". The fact is that s.116 is a denial of legislative power to the Commonwealth, and no more. No similar constraint is imposed upon the legislatures of the States. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state. The plaintiffs' plea for a broad construction overlooks the fact that we are dealing with a clause which does not grant power, but denies it. While it is true that a constitutional grant of plenary legislative power should be construed with all the generality which the words used will admit, carrying with it whatever is incidental to the subject-matter of the power, the same is not true of a provision which proscribes power: cf. Dixon C.J. in *Wragg v. State of New South Wales* (1953) 88 C.L.R. 353 at 386.

Furthermore, it seems to me that the words "for establishing" are not comparable with the words "respecting an establishment". The former words convey the sense of "in order to establish", and speak quite specifically of the purpose of the law in terms of the end to be achieved. "Respecting" conveys the notion of "in respect of" a particular subject-matter, namely, an establishment or religion, thereby providing a broad frame of reference.

I accept that the word "establishment" has no fixed connotation, but having regard to the other clauses which are contained in s.116, and to the precise manner of their expression, I infer a legislative intent to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution. The precise status, responsibility and privileges that attend such establishment may vary a good deal, and it is not necessary to consider its features in detail; the point to be made is that establishment involves the deliberate selection of one to be preferred from among others, resulting in a reciprocal relationship between church and state which confers and imposes rights and duties upon both parties. The nature of the responsibility of the state towards an established church is clearly exposed in the judgments of their Lordships in the House of Lords' decision in *General Assembly of Free Church of Scotland v. Overtoun* (1904) A.C. 515, where the basic principle of "establishment" is asserted as "the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word" (pp.646, 656, 677). It identifies a relationship which goes much deeper than financial assistance, whether casual or regular, from time to time, because it is expressive of a duty to maintain and support, or, in other words, a duty to "promote religion as embodied in the doctrine and standards of the Church" (p.694). Conversely, correlative to the right in the church to the protection and patronage of the state, the church is under a duty to pray for the civil magistrate and faithfully to conform to the church's doctrine and standards.

If it seems remote from reality to be speaking in terms such as these about a constitutional provision, it must be remembered that the eighty years that have elapsed since federation have witnessed a marked change in the status and

role of the church in the Australian community with a corresponding diminution of the sense of authority that formerly attached to the ecclesiastical realm.

Furthermore, it may be thought to be surprising that a prohibition of the kind that I have described was included in the absence of any express legislative power whereby the Parliament could ever have pursued such an objective. It may be that the explanation for any such incongruity is to be found in the chequered history of the clause in the constitutional conventions in the eighteen-nineties, and in an anxiety lest an inference of power was to be drawn from the acknowledgment of Almighty God in the preamble to the Commonwealth of Australia Constitution Act. While on present authority it is not permissible to seek the meaning of s.116 in the convention debates, I may say that I find it interesting that in the course of the conventions the religion clause began as a denial of power to the States, then was re-addressed to both the States and the Commonwealth, and finally took its present form. The separationist view of establishment, for which the plaintiffs contend, does not sit well with the form of s.116, addressed as it is only to the Commonwealth Parliament. The objective sought to be achieved by a clause construed consistently with the plaintiffs' contention could so easily be subverted by any of the State legislatures, which remain free to give such aid or support to religious bodies as they wished. But no State legislature could establish a national religion, and hence the prohibition was rightly directed to the Commonwealth. It will also be recalled that the 1898 convention was invited to adopt a form of words for the religion clause which would have placed the present issue beyond doubt, when an amendment from Tasmania to the effect that the clause include the words "nor appropriate any portion of its property for the propagation or support of any religion" was proposed and defeated. Be these things as they may, I believe it would be wrong to attach undue significance to the history of the clause. The actual words of the text supply the only firm ground on which to base a conclusion.

I have already adverted to the other clauses contained in s.116 as lending support for a narrow construction of the establishment provision, but the observation may deserve further brief explication. If the first clause is to be read, as the plaintiffs contend, as requiring the erection of "a wall of separation" between the church and the state, then it is difficult to see what room is left for the operation of the following clauses. The Commonwealth must not make any law for imposing any religious observance, but clearly such a law would offend the separationist principle. The same would be true of a law for prohibiting the free exercise of any religion, for one could hardly find a more glaring example of state interference in the religious realm. Again, the imposition of a religious test as a qualification for any office or public trust under the Commonwealth is clearly inconsistent with a prohibition of state involvement with religion. In other words, if the contention of the plaintiffs is correct, the

first clause more than covers the entire field to which the section refers, leaving nothing to be contributed by the remaining clauses. If such a result reflected the intended operation of the section, then in my opinion it would have been expressed, as it easily could have been, and was in the Tasmanian amendment which was rejected, in clear and unmistakable terms. On the other hand, if the establishment clause carries the meaning that I have given it, each of the following clauses has a distinct, intelligible and consistent area of operation.

Some argument has proceeded between the parties concerning the word "religion", but I do not find it to be a significant issue in the present case. Whilst I confess to some difficulty in thinking of the different denominations of the Christian faith as separate religions, as distinct from different forms of the one religion, it does not seem to me to do any violence to the wording of the first clause of s.116 to read it as forbidding any law for establishing any religion or any form of any religion.

It is against this background understanding of s.116 that I examine the submissions of the plaintiffs. They argue, inter alia, that the legislation in question is necessarily struck down by s.116 because:

(a) in the case of capital grants, the only relevant restraint is that which, for example, in s.15 of the *States Grants (Schools Assistance) Act*, 1978, provides that grants shall not be used in respect of facilities used wholly or principally for or in relation to religious worship;

(b) in the case of recurrent grants, there is no restraint at all in respect of religion within the school; and

(c) the administration of the Commonwealth scheme requires close consultation with and support of religious agencies.

It follows, in their submission, that buildings and other facilities provided with the help of Commonwealth funds are used for religious instruction, that recurrent grants aid the religious activities of church schools and assist the religious mission of the religion sponsoring the school. In so doing, the laws satisfy the description of laws for establishing any religion.

Given the interpretation of s.116 that I have expounded, it would seem to follow as a matter of course that these contentions must necessarily fail. Nevertheless, it is appropriate that I should make some observations about the scheme embodied in the legislation. In my opinion, the summary of the provisions of the *States Grants (Schools Assistance) Act* 1978 that appears earlier in these reasons clearly reflects a secular legislative purpose, that of upgrading the quality and range of education in primary and secondary govern-

ment and non-government schools throughout Australia. Even if one accepts the plaintiffs' submissions on the facts, it cannot be said that the primary effect of the legislation is to advance religion. It may be true that in many cases one effect may be to advance religion appreciably, but, even so, such a result is not central to the operation of the legislative scheme. It is an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant. Even the most "religious" of the schools which have received assistance are first and foremost educational institutions which are required to strive for a range and quality of education which is at least comparable to government schools. The amount of time devoted to secular instruction in such schools is necessarily substantial, the cost of which obviously forms the major part of the recurrent expenditure of the school. Similarly, the fact that some school buildings may be used for religious instruction for some periods each week cannot obscure the predominantly secular user reflected in the general balance of the secular purpose to the religious goal. The third of the schedules which appear earlier in these reasons makes it clear that, notwithstanding increased contributions from both Commonwealth and State legislatures, non-government schools are still required to fund a substantial part of their expenditure from private sources.

The plaintiffs' submission with respect to the Commonwealth's involvement with religion recalls attention to the *Schools Commission Act* 1973. But here again, I think that the attack is misconceived. It may be that the Commonwealth has chosen to pursue its purpose of aid to education in a manner that reserves to a Commonwealth agency, the Schools Commission, a great deal of detailed administrative work associated with the delivery of that aid to non-government schools. No doubt there were alternative methods of implementing the scheme that could have been chosen, and that would have occasioned less "entanglement" of Commonwealth officers with the representatives of non-government schools. But, in any event, the association between government and school is not based in religion. The fact that many administrators of non-government schools may be church adminstrators as well does not spell an entanglement of government with religion. The sole purpose of the collaboration is the pursuit of an educational goal.

Section 96

I have already expressed the opinion that a law which finds its authority in s.96 is nevertheless subject to s.116. For the purpose of examining the validity of the States Grants legislation by reference to the latter section I have assumed that the laws were otherwise authorised by the former section. I turn now to consider the plaintiffs' attack based on s.96. The section reads as follows:

> "96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

The plaintiffs focus by way of example on the *States Grants (Schools Assistance) Act* 1978, and cite ss.15 and 16 with respect to capital grants, and s.18(9) and s.19(9) with respect to grants towards recurrent expenditure in relation to systemic and non-systemic schools respectively. These provisions are described or set out earlier in these reasons. The plaintiffs submit that the essential feature of the scheme is that it is the Commonwealth, either the Parliament or the Minister or his delegate, that makes every relevant decision in connection with a grant. The State may elect whether or not to accept the grant, and that is all. The only function of the State is to pay money, in amounts fixed by the Commonwealth, to a school or school system nominated by the Commonwealth, to make an agreement with the school authority in terms which are determined by the Commonwealth, to receive repayment from a school authority of such amounts as the Commonwealth determines ought to be repaid by a school authority in the event of a breach of the agreement with the State, and then to repay that amount to the Commonwealth. In many cases, capital grants paid to a school enable the erection of buildings owned by the religion sponsoring the school. The conditions attached to the grant require the school authority of the school or school system as the case may be to relate directly to the Commonwealth, for example, in accounting for moneys spent, and in the provision of statistical information.

In these circumstances, the plaintiffs submit that the grants cannot be described as grants of financial assistance to the States within the meaning of s.96. They give no assistance to a State as a body politic but use it merely as a conduit or an agency by which moneys are distributed to schools and school systems upon conditions fixed by the Commonwealth.

In *The State of Victoria v. The Commonwealth* (1957) 99 C.L.R. 575 (*the second Uniform Tax case*) at p.605 Dixon C.J. observed:

> "There has been what amounts to a course of decisions upon s.96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition".

The Chief Justice then proceeded to review *Victoria v. The Commonwealth (the Federal Aid Roads case)* (1926) 38 C.L.R. 399, *Deputy Federal Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735 (High Court) and 63 C.L.R. 338 (Privy Council), and *South Australia v. The Commonwealth (the first Uniform Tax case)* (1942) 65 C.L.R. 373. In speaking of *Moran*, Dixon C.J. said (at pp.606-7):

> "Now it might have been thought that these provisions were outside s.96 because they gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among the wheat growers of the State. ... In fact, however, the provision was considered to amount to financial assistance to the State notwithstanding that the State was bound to distribute the money it received to the wheat grower."
>
> "The decision, which was affirmed in the Privy Council, without express reference to this use of s.96, must mean that s.96 is satisfied if the money is placed in the hands of the State notwithstanding that in the exercise of the power to impose terms and conditions the State is required to pay over the money to a class of persons in or connected with the State in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly. I should myself find it difficult to accept this doctrine in full and carry it into logical effect, but the decision shows that the Court placed no limitation upon the terms or conditions it was competent to the Commonwealth to impose under s.96 and regarded the conception of assistance to a State as going beyond and outside subventions to or the actual supplementing of the financial resources of the Treasury of a State".

It may be noted that the *second Uniform Tax* case did not confront Sir Owen Dixon with the need to determine for himself the *Moran* doctrine about which he expressed misgiving in the passage which I have just cited. Later in his judgment (at 610-611 he accepted the earlier decisions of the Court, including *Moran*, as establishing "the entire exclusion" of the limited operation that might have been assigned to s.96 based on the view "that there must be a need for relief or a reason for giving assistance which is not itself created by the Commonwealth legislation connection with the grant".

The cases to which I have referred give a meaning to s.96 which, at least for the time being, must be taken as settled. The Court is not asked to reconsider them in any respect. The plaintiffs accept them as authoritative and argue that they do not go so far as to require a determination that the legislation now in question is valid. The defendants rely upon them as conclusive in their favour on this particular question. Several of the States, while intervening in support of the validity of the legislation, indicated a wish at an appropriate time to re-argue the cases, but in the meantime were content to accept them as current authority.

The plaintiffs distinguish *Moran*, notwithstanding an apparent similarity to the present case, as basically different. They observe that the legislation in that case, the *Wheat Industry Assistance Act* was promoted by the States, that the Commonwealth was a partner in the scheme and made the grants at the instigation of the States as bodies politic, albeit that they were eventually to be

paid to a class of persons. The machinery of State government was necessarily involved in the administration of the scheme, and it was wrong therefore to describe the States as mere agents of the Commonwealth, with no discretionary responsibility.

I must confess that I have great sympathy with the plaintiffs' argument. The legislation provides a striking contrast in the discretion that is accorded to the States in the administration of the grants for government schools and the virtually total disregard of the States, save only for the barest acknowledgement of the formalities required by s.96, in the administration of the grants for non-government schools. The contrast is all the more remarkable in the context of a constitution which in the distribution of power within the federation does not confer on the Commonwealth Parliament a specific legislative power with respect to education.

But, unfortunately for the success of their argument, the plaintiffs mistake policy for law. The Court is not concerned with the wisdom or the expediency of the former, and the features of the scheme of which the plaintiffs complain are of this character. In the present state of the authorities, the legislation satisfies the requirements of s.96 for a valid law. It is a non-coercive law which in terms grants money to each of the States "by way of financial assistance to the State." The freedom of each State to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme, and its existence as a matter of law cannot be denied. The conditions attaching to the grant are those to be determined by the Commonwealth, but this has always been so. It is not necessary that the grant should benefit the State Treasury directly, or that the purpose of the grant should be within the express legislative power of the Commonwealth, or that the State should be the instigator or even a party to the initiation of the scheme.

In addition to the significance of the State's decision to accept the grant, the necessity for it then to enter into an agreement with the eventual recipient of a grant is also significant. The State enters into that agreement, not as an agent for the Commonwealth, but as a principal.

In any event, the plaintiffs have no answer, in my opinion, to the defendants' contention that the legislation does extend financial assistance to the States. It satisfies the most stringent tests that can be applied to that criterion. The States have assumed a governmental responsibility for all primary and secondary education within their bounds. If there were no other contributors, the total financial responsibility would fall on the State, as until recently it always has done in the case of government schools. In such a situation, the initiative and sacrifice assumed by those responsible for the existence of a non-government school system affords relief directly to the State Treasury, without relieving the

State of the general responsibility of oversight that it has assumed. The participation of the Commonwealth is a further source of help. In my opinion, there can be no doubt that Commonwealth grants to non-government schools within a State must have the effect of easing the claim that such schools would otherwise make upon State financial resources. It must not be forgotten that these schools are already receiving substantial financial assistance from State governments, and the level of this assistance must be affected by the existence of the Commonwealth scheme.

The Territories

As I have already indicated, the only question at issue in relation to grants to non-government schools in the Australian Capital Territory and the Northern Territory, apart from standing, is whether the legislation contravenes s.116. It will be clear from what I have already said as to the proper construction of that section, that in my opinion the legislation is valid.

Standing

The case raises questions of far reaching importance on the subject of standing, including the following:

(a) whether the Attorney-General of a State, suing on the relation of citizens of the State, has standing to challenge the constitutionality of an Appropriation Act authorising the expenditure of moneys in the Territories, and the *Independent Schools (Loans Guarantee) Act* 1969 which is a law of the Commonwealth operative only within the Territories;

(b) whether the individual plaintiffs, suing in their capacity as taxpayers and parents of children attending government schools, and resident in a State or a Territory, have standing to challenge all or any of the statutes in question;

(c) whether the decision of the Supreme Court of Canada in *Thorson v. Attorney-General of Canada* (No. 2) (1974) 43 D.L.R. 3d. 1, should be followed in Australia in a case in which a citizen seeks to challenge the constitutionality of a statute in circumstances where he has been unable to secure the fiat of an Attorney-General.

However, I have found it convenient to deal with the substantial merits of the case. My conclusion is that the challenged legislation is valid, with the result that the plaintiffs have failed to make out a case for any relief. The

question of standing is therefore only of academic interest, and firm decisions on these important issues ought to wait for another case which requires their resolution, and when there might be greater opportunity for more concentrated oral argument than was available in the present case.

I would dismiss the action.